

**Index to Guidelines and Legal Database**  
**Updated on 8/2/2012**

**NOTE:** This index is primarily designed to identify relevant 10th Circuit decisions on Sentencing Guidelines issues decided since March, 1996, when the 10th Circuit ceased publishing its monthly supplements to the Tenth Circuit Guideline Sentencing Case Annotations Section. In addition, the index contains information and cases that are the result of prior research in the District of Wyoming. The summaries are compiled by a lay person, not trained in the law, and may not be accurate. The cases should be researched prior to citing.

**Index**

1. General Application
2. Relevant Conduct
3. Chapter Two Offenses
  - A. Sex Crimes
  - B. Assault
  - C. Fraud/Theft
  - D. Robbery
  - E. Other
4. Drugs (General)
5. Methamphetamine
6. LSD
7. Firearms
8. Money Laundering
9. Immigration
10. More than Minimal Planning
11. Victim
12. Role
13. Obstruction
14. Multiple Counts
15. Acceptance of Responsibility
16. Criminal History
17. Penalty Enhancements, including Career Offender
18. Probation
19. Incarceration
20. Supervised Release/Parole
21. Fine/Restitution
22. Sentencing
23. 18 U.S.C. 924(c)
24. Revocations
25. Felony definitions
26. Departures
27. Plea Agreements
28. Organizational Defendants
29. Juvenile Law
30. 28 U.S.C. 2255 Motions and other Appeals Issues
31. Safety Valve
32. Apprendi/Blakely/Booker Cases
33. Pretrial Issues
34. Mental Health

## I. General Application

1. U.S. v Nelson: 36 F.3d 1001 (10th Cir. 1994): 10th Circuit adopts one-book rule as recommended by USSG.
2. Bradley v U.S. 93 S.Ct. 1151 (1973): The General Savings Clause, 1 U.S.C. 109, should be construed, absent evidence of Congressional intent to the contrary, that an offense should be punished according to the law in force at the time of the offense, even though the penalty may have been lowered by the time of sentencing. Applicable to changes in felony level dollar amounts for Bank Embezzlement, etc., effective 10-11-96.
3. U.S.v. Ciapponi, 77 F.3d 1247 (10th Cir. 1996): Tenth Circuit holds that, with the defendant's consent, a U.S. Magistrate can take a felony plea, with authority from 28 U.S.C. 636(b)(3), which states: "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."
4. U.S.v. Adams, 140 F.3d 895 (10th Cir.1998): Although 32 C.F.R. 210.3(d) carries a 30 day maximum jail sentence and a \$50 fine for DUI on an Dept. Of Defense installation (such as an AFB), it is still permissible to assimilate the state statute for DUI instead because C.F.R. 210.2(c) specifically states that the regulation applies only when traffic offenses cannot be assimilated under 18 U.S.C. 13. The 10th Circuit notes, for example, that where a state's traffic law violations are civil rather than criminal in nature, such laws cannot be assimilated and the C.F.R. regulation would apply instead.
5. U.S. v Rucker, 178 F.3d 1369, 1371 (10<sup>th</sup> Cir. 1999): The 10<sup>th</sup> Circuit holds that double counting of specific offense characteristic enhancements is permissible if each enhancement serves a unique purpose under the guidelines. The Court notes most Circuits have held that double counting is permissible unless it is specifically excluded.

## II. Relevant Conduct

1. U.S. v Neighbors 23 F.3d 306 (10th Cir. 1994): Statute of limitations is irrelevant to relevant conduct.
2. U.S. v Roederer: 11 F.3d 973 (10th Cir., 1993) Defines "same course of conduct" in a drug case.
3. (This case has been reversed by Santos, mentioned later in this section). U.S. v Reyes 40 F.3d 1148 (10th Cir. 1994) and U.S. v Jenkins 866 F2d 331 (10th, 1989) These cases hold that application of a statutory mandatory minimum is to be determined based on all relevant conduct regardless of drug amounts cited in the Indictment.
4. U.S. v Jose Garcia, 78 F.3d 1457 (10th Cir. 1996): Interesting case from Northern Dist. of OK, involving stipulated drug amount in plea agreement of "approximately" 100 grams cocaine. USPO interviews two CI's who indicate Garcia was delivering to them about 1/2 pound to 1 1/2 pounds **per week** of cocaine. CUSPO interviews several police officers who indicate the CI's are reliable. AUSA says they are not. Judge holds evidentiary hearing, and subpoenas the CI's, who testify to what they said to USPO. Judge finds drug amount should be 499 grams (actually, the drug quantity was much higher, but Court did not want to raise the statutory maximum of 20 years, and thus would not cross the 500 gram threshold). Garcia appeals, 10th Circuit says the District Court is duty bound to investigate drug quantities where there is a discrepancy, and the Government's refusal to offer any evidence beyond 100 grams leaves the Court free to conduct its own investigation.
5. U.S. v James R. Ledbetter 108 F.3d 1388 (10th Cir., 1997): Ledbetter objected to the inclusion of 73 grams of methamphetamine as relevant conduct that he felt had been illegally seized from his mother's garage, in a locked matchbox inscribed with his nickname. The 10th Circuit ruled that unless a defendant can show that illegally obtained evidence was procured by law enforcement with the express purpose of enhancing his sentence, there is nothing to be gained by operation of the Exclusionary Rule. The 10th Circuit said the seized methamphetamine "would be relevant at sentencing even if the search of the matchbox were held to be illegal."
6. U.S. v Watts 117 S.Ct. 633 (1997): Supreme Court holds that jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.

7. U.S. v William C. Robey 120 F.3d 271 (10th Cir., 1997) Reaffirmation that a hearsay statement, in this case, a statement of a codefendant, and a statement by the defendant to the Probation Officer, can be considered at sentencing "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."
8. U.S. v Lopez, 125 F.3d 597 (8<sup>th</sup> Cir. 1997); and U.S. v. Steward, 16 F.3d 317 (9<sup>th</sup> Cir. 1997): These cases indicate that, in a drug case where a defendant unknowingly delivers a counterfeit substance instead of the intended substance, the drug calculation should be based on the substance the defendant intended to supply. I could not locate a 10<sup>th</sup> Circuit case on the issue.
9. U.S. v Norman, 172 F.3d 1880, 1999 WL 51767 (10<sup>th</sup> Cir. (Colo)), unpublished: The 10<sup>th</sup> Circuit notes that personal use amounts of drugs are to be included in relevant conduct for manufacturing or conspiring to distribute drugs, referencing U.S. v Wood, 57 F.3d 913, 920 (10<sup>th</sup> Cir. 1995), but does not answer the question of whether a defendant convicted of possession with intent to deliver can deduct personal use amounts (the point is moot in Norman's case). The 10<sup>th</sup> Circuit notes there is a split in the Circuits on the issue.
10. U.S. v Torres, 182 F.3d 1156 (10<sup>th</sup> Cir. 1999): In a situation where prior drug offenses occur during the time frame of a drug conspiracy, the burden is upon the Government to prove by a preponderance that the prior convictions are not part of relevant conduct. The defendant does not have to prove that they are related to the instant offense. Such a relationship is assumed unless proven otherwise.
11. U.S. v Asch, 207 F.3d 1238, (10<sup>th</sup> Cir. 2000): The 10<sup>th</sup> Circuit enters uncharted territory and holds that personal use amounts of drugs can be used to determine the guideline range, but must be deducted when determining the statutory penalty provision. The defendant bears responsibility of demonstrating he always intended to personally consume some specific portion of the drugs received from a co-conspirator. Also, a District Court can find, based upon a preponderance of evidence established by the Government, that all drugs obtained during the course of a conspiracy were obtained with the common objective of distribution.
12. U.S. v Keifer 198 F.3d 798 (10<sup>th</sup> Cir. 1999): The 10<sup>th</sup> Circuit reaffirms that when a defendant objects to a sentencing enhancement recommended in a PSR, the Court cannot simply adopt the findings of the PSR. The government bears the burden of proving disputed facts by a preponderance of the evidence. However, this case appears to in no way overrule U.S. v Garcia, supra, #4, which addresses situations in which the government refuses to place evidence on the record per a Plea Agreement.

### III. Chapter Two Offenses

#### A. Sex Crimes (2A3.1, 2A3.2, 2G2.1)

1. U.S. v Passi, 62 F.3d 1278 (10th Cir. 1995): The 10th Circuit rules sexual abuse of a minor under the age of 14 may be considered a "crime of violence" and the appropriate guideline to be used is 2A3.1, even if no "force" was involved in the offense. See also U.S. v Reyes-Castro, 13 F.3d 377 (10th Cir. 1993) which states: "when an older person attempts to sexually touch a child under the age of 14, there is always a substantial risk that physical force will be used to ensure the child's compliance."
2. U.S. v Tagore, 158 F.3d 1124 (10<sup>th</sup> Cir. 1998): The cross reference in 2G2.2(c) should be applied according to relevant conduct provisions of 1B1.3. So, even if the defendant did not, for example, cause a minor to engage in sexually explicit conduct, the defendant can be held accountable for the actions of a codefendant who did.
3. U.S. v Hibbler 159 F.3d 233 (6<sup>th</sup> Cir. 1998): This case is a good overview for defining "distribution" under U.S.S.G. § 2G2.2(b)(2). It references two other cases, one from the 5<sup>th</sup> Circuit and one from the 7<sup>th</sup> Circuit. There is no 10<sup>th</sup> Circuit case law yet on this issue. "Distribution" may need to be in exchange for something, such as money, favors, other child pornography, etc. to meet the 2G2.2(b)(2) definition, justifying the five level departure.
4. U.S. v Dawson Johnson, 183 F.3d 1175 (10<sup>th</sup> Cir. 1999): The 10<sup>th</sup> Circuit upholds a two-point enhancement per § 2G2.4(b)(3) for receiving pornography via computer, finding it is not necessary to also send pornography for the enhancement to apply.

5. U.S. v Reeves, 253 F.3d 1201(10<sup>th</sup> Cir. 2001): In order to apply the enhancement of two levels per § 2G2.1(b)(3) “if a computer was used to solicit participation by or with a minor in sexually explicit conduct” does not require an on-line solicitation. It is sufficient if the computer is used in other ways, such as to show pornographic images to the victim in person.
6. U.S. v White, 244 F.3d 1199 (10<sup>th</sup> Cir. 2001): In this opinion, the 10<sup>th</sup> Circuit rejects a blanket prohibition against use of a computer or the Internet for a defendant convicted of receiving child pornography. The opinion provides a useful discussion of what factors need to be considered in determining appropriate conditions of supervised release to ameliorate the risk associated with computer sex offenders.
7. U.S. v Walser, 275 F.3d 981 (10<sup>th</sup> Cir. 2001): Walser, convicted of possessing child pornography, challenged a special condition of supervised release barring his use of or access to the Internet without the prior permission of the Probation Officer. The 10<sup>th</sup> Circuit compared this case to *White*, supra, and let the condition stand under a plain error standard, but expressed concern that “the probation office might unreasonably prevent Mr. Walser from accessing one of the central means of information-gathering and communication in our culture today.”
8. U.S. v Tucker, 305 F.3d 1193 (10<sup>th</sup> Cir. 2002): This case involved a conviction for Possession of Child Pornography. The defendant never stored child pornography on his computer of his own volition, but when he viewed images of child pornography, they were temporarily stored in his cache file. Tucker admitted knowing the images were stored there. Because he could exercise control over those images in his cache file, and because he knew his computer was storing the images, he was properly convicted of knowingly possessing child pornography.
9. U.S. v Kimler, 335 F.3d 1132 (10<sup>th</sup> Cir. 2003): A four-level enhancement for materials involving sadistic or masochistic conduct is established in cases where prepubescent minors are vaginally or anally penetrated by an adult penis.
10. U.S. v Robertson, 350 F.3d 1109 (10<sup>th</sup> Cir. 2003): In a split decision, the 10<sup>th</sup> Circuit reverses the District Court and holds that a two-level enhancement for use of a computer to facilitate travel of the defendant to participate in prohibited sexual activity is appropriate in cases where a law enforcement officer poses as a panderer who has access to minor children, under U.S.S.G. § 2A3.2(b)(3)(B). The rationale is that the defendant is a participant in the offense, as listed in subsection (B), and he used a computer to work out dates and times of his visit to Colorado for having sex with two minor males.
11. U.S. v McGraw, 351 F.3d 443 (10<sup>th</sup> Cir. 2003): The 10<sup>th</sup> Circuit holds that, in soliciting illegal sexual trysts on line, a defendant uses a computer to facilitate his transportation or travel to engage in prohibited sexual conduct. Regardless of whether his final travel plans were arranged by telephone, the initial solicitation occurred through use of a computer.
12. U.S. v Munro, 394 F.3d 865 (10<sup>th</sup> Cir. 2005): Use of a Computer to Attempt to Persuade a Minor to Engage in Illegal Sexual Acts is a crime of violence per 18 U.S.C. 924(c)(3) because its nature involves a substantial risk that physical force may be used in the course of committing the offense. A categorical approach is used, not dependent upon the facts of the case, which involved on-line chats with an undercover police officer and a trip to meet the minor female while armed with a handgun.
13. U.S. v McCutchen, 419 F.3d 1122 (10<sup>th</sup> Cir. 2005): The government sought a penalty increase to a mandatory minimum term of 10 years under 18 U.S.C. § 2252(a) for a prior conviction related to abusive sexual conduct involving a minor. McCutchen had pled guilty to “Sexual Battery,” which, under Kansas law, did not have as an element that the victim was a minor. Contrary to examining crimes of violence under 18 U.S.C. § 924(e), the 10<sup>th</sup> Circuit concluded it was permissible to look to the underlying facts of the offense to determine if the conviction was committed against a minor. Thus, the categorical approach does not apply to enhancements under 18 U.S.C. § 2252.
14. U.S. v Shaffer, 472 F.3d 1219 (10<sup>th</sup> Cir. 2007): Because it requires conscious effort to place files in a Shared Folder on a peer-to-peer file-sharing network, an enhancement for distribution of child pornography is appropriate when a defendant places files in a Shared Folder. The defendant does not have to personally send the files to qualify for this enhancement.
15. U.S. v Geiner, 498 F.3d 1104(10<sup>th</sup> Cir. 2007): The Tenth Circuit upheld a five-level enhancement for distribution for a thing of value, where the identified thing of value was the anticipated faster download speed. However, the Tenth Circuit declined to approve the enhancement for distribution for a thing of value in every case involving a file-sharing program. There must be case-specific evidence of sharing files for the purpose of

receiving a thing of value in order for the five-level enhancement to apply.

16. U.S. v McCutchen, 419 F.3d 1122 (10<sup>th</sup> Cir. 2005): This case holds that for determining a “prior conviction” under 18 U.S.C. § 2252A(b)(1) or (b)(2), the Court is entitled to look beyond the offense of conviction to the actual conduct. Even a misdemeanor conviction, if the conduct is “related to” the proscribed conduct mentioned in the statute, would trigger the penalty enhancement to a mandatory minimum 15 years. This case has been favorably cited in 2007 cases in the Sixth and Eighth Circuits, U.S. v McGrattan, 504 F.3d 608; and U.S. v Weis, 487 F.3d 1148, respectively.

17. U.S. v Fore, 507 F.3d 412 (6<sup>th</sup> Cir. 2007): A conviction for Transportation of Child Pornography precludes the reduction of two offense levels for only receipt of child pornography, as transportation and receipt are not synonymous.

18. U.S. v Husted, 545 F.3d 1240 (10<sup>th</sup> Cir. 2008): In order to convict someone under SORNA, 18 U.S.C. § 2250, the “travel” must have occurred on or after July 27, 2006. The statute cannot be used to prosecute those who traveled prior to the date of enactment.

19. U.S. v Becker, 625 F.3d 1309 (10<sup>th</sup> Cir. 2010): The Tenth Circuit held that a prior conviction for Indecent Solicitation of a Child under Illinois state law was an enhancing prior conviction per 18 U.S.C. § 2552(b) because it was “related to” “aggravated criminal sexual abuse.” The defendant had been convicted of soliciting a minor female to engage in oral sex, although the person being solicited was actually a police officer. The phrase “relating to” is to be interpreted broadly.

## B. Assault

1. U.S. v Rue 988 F.2d 94 (10<sup>th</sup> Cir. 1993): Assaults under 18 U.S.C. 111 may be addressed by two different guidelines: 2A2.2 and 2A2.4. If a defendant merely obstructs or impedes an officer, use 2A2.4. If there was physical contact or if the use of a dangerous weapon was threatened while obstructing or impeding an officer, then the base offense level is increased from six to nine under 2A2.4. In contrast, 2A2.2 should be used if a dangerous weapon was in fact used with intent to commit bodily harm.

2. U.S. v Mejia-Canales, 467 F.3d 1280 (10<sup>th</sup> Cir. 2006): A small laceration on the inside of the mouth and a red mark on the forehead, with a mandatory trip to the infirmary where the victim received ibuprofen and oral gel for the cut in his mouth, does not qualify as “bodily injury” under the Sentencing Guidelines.

3. U.S. v Tindall, 519 F.3d 1057 (10<sup>th</sup> Cir. 2008): A doctor’s statement about the extent of injury establishes facts by a preponderance standard to allow a court to apply an enhancement for “permanent or life-threatening bodily injury” even where the defendant pled guilty to Assault Resulting in Serious Bodily Injury because the statutory definition of Serious Bodily Injury is broader than the Guideline definition.

## C. Fraud/Theft

1. U.S. v Lowder 5 F.3d 467 (10<sup>th</sup> Cir. 1993): Interest can be properly included as loss in certain fraud cases, where the promise of a fixed rate of return convinced investors to invest. ***Invalid after 11-1-01 per change in Guidelines Manual.***

2. U.S. v Abud-Sanchez 973 F.2d 835 (10<sup>th</sup> 1992): To be loss under 2F1.1, the loss must be proven criminal loss. Civil fraud loss does not qualify. If the government cannot prove criminal intent, the loss cannot be used under 2F1.1.

3. U.S. v Virgil Allan Copus 110 F.3d 1529 (10<sup>th</sup> Cir. 1997): The 10<sup>th</sup> Circuit adopts the Fourth Circuit's method of calculating loss when a false statement is made **after** a loan is secured:

"We hold that in the event a bank loan legitimately is obtained by one who subsequently submits a statement that is required in connection with the loan and that statement is false (e.g., defendant falsifies a required periodic report of his current assets), the loss under U.S.S.G. 2F1.1 is the loss that can be attributed to the false statement. Generally, the loss attributable to the false statement is the amount of the outstanding loan less any amount recouped by the bank from assets pledged against the loan, less the estimated amount the bank would have lost had the statement not been false."

Quoting from U.S. v Wilson, 980 F.2d 259,262 (4<sup>th</sup> Cir. 1992). The Copus case was remanded for a determination of the proper loss.

4. U.S. v Tatum, 518 F.3d 769 (10<sup>th</sup> Cir. 2008): A counterfeit check is not an “unauthorized access device or a

counterfeit access device. Any paper instrument is beyond the definition of an access device, as noted in 18 U.S.C. § 1029(e)(1).

5. U.S. v Sutton, 520 F.3d 1259 (10<sup>th</sup> Cir. 2008): In a case involving tampered odometers on automobiles, a loss of 40 to 50% of the purchase price per vehicle is reasonable, according to expert testimony.

#### **D. Robbery (2B3.1)**

1. U.S. v Villanueva, 76 F.3d 394 (10<sup>th</sup> Cir. 1996): Defendant committed armed bank robbery with a disabled replica antique firearm. The weapon was not produced during the robbery, but from the defendant's actions, the teller felt the defendant had a weapon. The issue was whether the defendant should receive a five level increase for possessing a "firearm" or a two level increase for possessing a dangerous weapon. The Court ruled the five level enhancement was appropriate because the guideline definition of a firearm is broader than the statutory definition, and because it was not obvious to the teller that the firearm was inoperable.
2. U.S. v. Metzger, 233 F.3d 1226 (10<sup>th</sup> Cir. 2000): Enhancement is proper under 2B3.1(b)(3)(B) for injury to a innocent bystander by a police officer investigating an unarmed robbery because such injury is a reasonably foreseeable result of the dangerous nature of bank robbery.
3. U.S. v Pearson, 211 F.3d 524 (10<sup>th</sup> Cir. 2000): A sentencing court may apply an enhancement for physically restraining a robbery victim with a firearm, even if other firearm enhancements are precluded because the defendant is convicted of 18 U.S.C. § 924(c) in connection with the robbery.
4. U.S. v Miera, 539 F.3d 1232 (10<sup>th</sup> Cir. 2008): Brandishing a gun inside a bank and telling the occupants "Don't move" is sufficient to trigger an enhancement for "physical restraint."

#### **E. Other**

1. U.S.v. Gonzalez, 2 F.3d 369 (11<sup>th</sup> Cir. 1993): The 11<sup>th</sup> Circuit determines that for a violation of harboring a fugitive, 18 U.S.C.1071, the 'underlying offense' referred to by USSG 2X3.1 is **not** the charge of escape or failure to appear if there is one, but rather, the original charge from which the fugitive is attempting to avoid.

## **IV. Drugs (General)**

1. U.S. v Rios 22 F.3d 1024 (10<sup>th</sup> Cir. 1994): Cash can be converted into drug quantities for guideline purposes.
2. U.S. v Souders 30 F.3d 142 (10<sup>th</sup> Cir. 1994): Weight of drug mixture does not include waste by-products that must be removed before the substance can be used.
3. U.S. v James Brown 42 F.3d 1406 (10<sup>th</sup> Cir. 1994): Enhancement for possession of a firearm in a drug offense applies if codefendant possessed the firearm, as long as the conduct was "reasonably foreseeable".
4. U.S. v Anthony Johnson 42 F.3d 1312 (10<sup>th</sup> Cir. 1994), cert. denied, 115 S.Ct. 1439 (1995): Government does not have to show a firearm was connected to drug trafficking. Rather, the defendant must show it was not. Proximity is enough to establish relationship between firearm and drugs.
5. U.S. v Roederer, 11 F.3d 973 (10<sup>th</sup> Cir. 1993): The two point enhancement for possession of a firearm pursuant to 2D1.1(b)(1) is to be determined not by merely examining the "offense of conviction", but by examining the broader scope of "the same course of conduct or common scheme or plan".
6. U.S. v Edward Dean Duncan 110 F.3d 74 (10<sup>th</sup> Cir. 1997): This case answers an interesting question: How is cash converted into drugs if more than one type of drug is seized? In this case, both methamphetamine and marijuana were seized, along with over \$800,000 cash. The methodology approved by the 10th Circuit involved determining the relative cash value of the seized drugs, and providing the same percentage to the cash. For example, in this case the value of marijuana to meth was about 3:1, and that same ratio was used to determine how much of each type of drug the cash represented.
7. U.S. v Keith Lee Bentley 111 F.3d 140 (10<sup>th</sup> Cir. 1997): The 10th Circuit rules that Felon in Possession of a Firearm and Possession of PCP are not to be grouped - they affect different societal harms.
8. Memo dated 5-20-97 entitled "Schedule of Drugs". It has attached 21 CFR 1308.11-.15, Schedules I through

V of DEA's drug table. As the memo notes, 21 U.S.C. 812 is not current, and contains inaccuracies, such as listing amphetamine as a Schedule III controlled substance, when it is actually a Schedule II drug.

9. U.S. v Monica Shevette Carter 131 F.3d 152 (10th Cir. 1997): 10th Circuit rules that two level enhancement for possession of a firearm is applicable in drug cases even where the firearm was only associated with conduct for which the defendant was acquitted. If the Court finds by a preponderance of the evidence that the drug quantity associated with the acquitted count is properly included as relevant conduct, so therefore would a firearm associated with the acquitted count.

10. U.S. v Onheiber, 173 F.3d 1254 (10<sup>th</sup> Cir. 1999): The 10<sup>th</sup> Circuit holds that U.S.S.G. § 2X1.1 does not apply to attempted drug crimes per Sentencing Commission Amendment 447. A reduced offense level for an attempted drug crime is therefore not applicable.

11. U.S. v Timley, Jr., 188 F.3d 520, 1999 WL 317508 (10<sup>th</sup> Cir.(Kan.)): In this unpublished opinion, the 10<sup>th</sup> Circuit holds that the 2D1.2 guideline only applies when the defendant is convicted of 21 U.S.C. § 860 - not simply when the drug trafficking offense was committed within 1000 feet of a school.

12. U.S. v Jacobs, 579 F.3d 1198 (10<sup>th</sup> Cir. 2009): For purposes of denying federal eligibility benefits under 21 U.S.C. § 862(a), Possession with Intent to Distribute a Controlled Substance is NOT an offense "consisting of the distribution of controlled substances.

## V. Methamphetamine

1. U.S. v Deninno 29 F.3d 572 (10th Cir. 1994). The 10th Circuit states it will not assume a methamphetamine conviction automatically is a conviction for D-Meth rather than L-Meth.

2. U.S. v Gregg Dover 46 F.3d 1152 (10th Cir. 1995): Mandatory minimum in 21 U.S.C. 841 does not distinguish between D and L meth.

3. U.S.v Havens 910 F.2d 703 (10<sup>th</sup> Cir. 1990): Estimate quantity of meth that could be produced when defendant is trying to make meth with listed precursors.

4. U.S. v Larry D. Richards 87 F.3d 1152 (10th Cir. 1996): En banc hearing of 10th Circuit rules that, as with LSD in the Chapman decision, waste water and other non-marketable products should be included in determining the applicability of mandatory minimums under 21 U.S.C 841 for other controlled substances. The Richards case involved a seizure of 28 grams of methamphetamine in 32 kilograms of waste water. In essence, the phrase "mixture or substance" has completely different meanings in the Sentencing Guidelines Manual versus 21 U.S.C. 841, according to the 10th Circuit, in spite of the statement to the contrary in the first sentence of Application Note 1 following 2D1.1. The 10th Circuit splits with the Second, Third, Sixth, Seventh and Eleventh Circuits.

5. U.S. v Gigley, 213 F.3d 509 (10<sup>th</sup> Cir. 2000): In cases in which the amount of methamphetamine(actual) is known, it is error not to use that amount if it results in a higher base offense level than using the amount of mixture or substance containing methamphetamine.

## VI. LSD

1. Chapman v U.S., 111 S.Ct. 1919 (1991): The weight of the blotter paper containing LSD, and not the LSD itself, is used to determine the applicability of a mandatory minimum sentence.

## VII. Firearms

1. U.S. v Hall 20 F.3d 1066 (10th Cir. 1994): If state law has restored civil rights to a felon without expressly limiting the felon's firearms privileges, that felon is not subject to federal firearms disabilities.
2. U.S. v. Lester Eugene Fowler 104 F.3d 368 (10th Cir. 1996): Effective 7-1-94, all newly convicted felons in the state of Colorado are prohibited from possessing a firearm. However, prior to that date, if an offender convicted of a non-violent felony in a state court in Colorado had completed his prison sentence, **all** civil rights are automatically restored by Colo. Const. Art. VII, paragraph 10, not excluding the right to own a firearm (see Hall above). Fowler's sentence was affirmed on other grounds.
3. U.S. v Rowlett 23 F.3d 300 (10th Cir. 1994): Fraudulently obtained firearm is not "stolen" for purposes of 2K2.1(b)(4).
4. U.S. v Alessandroni, 982 F.2d 419 (10th Cir. 1992): It is not double counting for a prior felony conviction to affect both the the base offense level and the criminal history category.
5. U.S. v Solomon; 95 F.3d 33 (10th Cir. 1996): 10th Circuit upholds base offense level of 20 under 2K2.1(a)(4)(B) for possession of firearm by prohibited person. USPO based prohibited status on the fact that defendant "was a frequent user of controlled substances". Proof established by self-reported history of drug use, seizure of meth and paraphernalia at time of arrest, and positive drug tests while on bond.
6. Cross reference to U.S. v. Miller, 84 F.3d 1244 (10th Cir. 1996), number 6 under 924(c). Definition of "carry".
7. U.S. v Leo Earl Gamblin, Jr., 107 F.3d 22 (10th Cir. 1997): If, in a firearms case, firearms are traded for drugs and thus "used or carried during or in relation to a drug trafficking offense" as defined by 18 U.S.C. 924(c)(1), then by definition the firearms are "possessed in connection with another felony offense". The 10th Circuit said that firearms-for-drugs trades fall within the shorter reach of 924(c)(1), and thus must fall under the broader reach of 2K2.1(b)(5). It would appear to be improper double counting to assess four levels under 2K2.1(b)(5) for possession in connection with another felony offense if the defendant was convicted at the same time of using the firearms in drug trafficking activity pursuant to 924(c)(1).
8. Cross reference to U.S. v Bentley, #10 under "Drugs, General."
9. U.S. v Coyette Deon Johnson, 130 F.3d 1420 (10th Cir. 1997): 10th Circuit follows 11th Circuit and holds that a defendant cannot be convicted for two counts of 922(g) for the same firearm. For example, it is improper to convict for Felon in Possession, and Unlawful Possession by User of Controlled Substance, if both counts involve one and the same firearm.
10. U.S. v Mojica, 214 F.3d 1169(10<sup>th</sup> Cir. 2000) Mojica was a convicted felon, living with his brother and niece. His brother brings home a shotgun he borrowed to go turkey hunting. Mojica later has an argument with his niece and she threatens to turn him in for possessing the shotgun. Mojica decides to return the shotgun to its owner, but is arrested in transit. The question is whether the "sporting purpose" reduction can apply to Mojica and the 10<sup>th</sup> Circuit says it can, even though Mojica did not possess it for sporting purposes, his brother did, and Mojica never possessed it with any purpose in mind.
11. U.S. v Dwyer 245 F.3d 1168 (10<sup>th</sup> Cir.2001): The 10<sup>th</sup> Circuit holds that possession of an unregistered firearm is a crime of violence for Career Offender purposes as defined in U.S.S.G. § 4B1.2.
12. U.S. v Browning, 252 F.3d 1153 (10<sup>th</sup> Cir. 2001): The 10<sup>th</sup> Circuit approves use of the same underlying felony conviction to both increase the base offense level per § 2K2.1(a)(4)(A), and trigger the four-level enhancement per § 2K2.1(b)(5).
13. U.S. v Collins, 313 F.3d 1251 (10<sup>th</sup> Cir. 2002): The reduction to offense level 6 for "sporting purposes" possession may be applied where the defendant possessed a firearm for sporting purposes (he obtained hunting licenses regularly), and used the firearm lawfully (he twice used it as collateral for automobile repairs).
14. U.S. v Brown, 314 F.3d 1216 (10<sup>th</sup> Cir. 2003): After escaping from custody, any possession of a firearm subsequent to that escape may be considered "in connection with" another felony offense, as an offense of escape continues until the defendant is again in custody.
15. U.S. v Hays, 526 F.3d 674 (10<sup>th</sup> Cir. 2008): The Wyoming Battery statute precludes "unlawfully touching another in a rude, insolent or angry manner." This language is too broad to qualify as a misdemeanor "crime of violence," and a categorical approach must be used to determine if a conviction under this statute includes conduct of "intentionally, knowingly or recklessly causes bodily injury to another." If not, then such a conviction cannot be used to support a conviction for possessing a firearm by an individual convicted of a domestic violence misdemeanor.
16. U.S. v Varela, 2009 WL 3838275 (10<sup>th</sup> Cir. 2009): A cross reference to the drug guideline is upheld. Tenth



Circuit rejects attempt to distinguish between “in connection with another felony offense” and “in connection with the commission or attempted commission of another offense.” In essence, the cross-reference to the other offense guideline will apply any time the offense level is greater than that for the firearms offense.

17. U.S. v Campbell, 372 F.3d 1179 (10<sup>th</sup> Cir. 2004): Any firearm used to enhance the firearms guideline for illegal possession must have interstate nexus established.

18. U.S. v Terrell, 608 F.3d 679 (10<sup>th</sup> Cir 2010): It is permissible to increase the firearms guideline for number of weapons even when the defendant is also convicted of 924(c) counts. This is not improper double counting, as the two harms are separate and do not overlap.

## VIII. Money Laundering

1. U.S. v Johnson 971 F.2d 562 (10th Cir. 1992): Cannot add loss from wire fraud to money that was laundered as fungible items under 3D1.2(d). The societal harms of fraud and money laundering are different. Fraud injures an individual, money laundering injures society. ***Invalid after 11-1-01 per change in Guidelines Manual.***

2. U.S. v Huff, 2011 WL 1467564 (10<sup>th</sup> Cir. 2011): The elements of money laundering are met when a defendant obtains criminally derived funds in the form of a check, and deposits that check into a bank account. It does not matter whether or not the check clears or he accesses the money in the account.

3. U.S. v Keck, 643 F.3d 789 (10<sup>th</sup> Cir. 2011): The Tenth Circuit holds that Application Note 2C following 2S1.1 applies in cases in which a defendant is convicted of money laundering, but the base offense is determined for underlying criminal conduct where there is no conviction for that conduct. In such cases, any Chapter 3 enhancements are applicable only to money laundering and not to the underlying conduct. However, where there is a conviction for the underlying conduct, Chapter 3 enhancements may be applied for the underlying conduct.

## IX. Immigration

1. U.S. v Diaz-Bonilla, 65 F.3d 875 (10th Cir. 1995): The 10th Circuit holds that "felony" means a conviction carrying maximum penalty of more than one year, even if the state defines the crime as a misdemeanor. Offender was convicted of Third Degree Assault in Colorado, classified as a misdemeanor, but has maximum penalty of two years imprisonment. Offender was assessed four level increase because he had been deported following a "felony" conviction, based on the Colorado assault. 10th Circuit upheld this ruling.

2. U.S. v Cabrera-Sosa, 81 F.3d 998 (10th Cir. 1996) cert. denied, 117 S.Ct. 218 (1996): The defendant was Indicted for Re-entry following deportation subsequent to an Aggravated Felony conviction, but pled guilty to the lesser included offense of Re-entry following deportation subsequent to a felony conviction, in violation of 8 U.S.C. 1326(b)(1). However, the Court still applied the enhancement of 16 levels pursuant to 2L1.2(b)(2) because the defendant had a prior aggravated felony conviction. The 10th Circuit upheld the conviction. The only apparent benefit of pleading to 8 U.S.C. 1326(b)(1) versus 8 U.S.C. 1326(b)(2) appears to be the difference in statutory maximum penalty - 10 years versus 20 years. The guideline application is the same. **THE FOLLOWING HAS BEEN VACATED BY LOPEZ V GONZALES, INFRA** *In addition, Cabrera-Sosa also contains a ruling that felony possession of a controlled substance, with no element of intent to deliver, is an aggravated felony because "Possession" can be punished under Title 21, (844(a)). This ruling in spite of the fact that, under 844(a), simple possession of anything other than 5 or more grams of crack cocaine is only a misdemeanor. Furthermore, the 10th Circuit ruled that for applying ex post facto consideration, do not look to when the underlying aggravated felony was committed, look to when the defendant was charged with Reentry. Also see U.S. v Miguel Valenzuela-Escalante 130 F.3d 944 (10th Cir. 1997) for another case dealing with a state Felony Possession charge considered as an aggravated felony. Also, see U.S. v Raul Miramontes-Lamas, 139 F.3d 913, 1998 WL 50955 (10th Cir. Utah)(unpublished).*

3. U.S. v Acuna-Diaz, 86 F.3d 1167 (10th Cir. 1996): 10th Circuit rules it is permissible to impose consecutive sentences for an underlying felony conviction for Illegal Re-entry and a TSR violation based upon the

exact same conduct.

4. U.S. v Enrique Luna-Rodriguez, 94 F.3d 656 (10th Cir. 1996): 10th Circuit indicates a U.S. District Court is **not** authorized to order deportation as a condition of supervised release under 18 U.S.C. 3583(d). The 10th Circuit gives scripted language a District Court **can** use:

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. 1101-1524. As a further condition of supervised release, if ordered deported, defendant shall remain outside the United States.

5. U.S. v Alejandro Cisneros-Cabrera 110 F.3d 746 (10th Cir. 1997): The 10th Circuit affirms that 1326(b) is merely a sentencing enhancement, and rules that it applies at the moment an alien is deported after conviction for an aggravated felony, and applies even if the underlying aggravated felony is vacated before sentencing on a new charge of Illegal Reentry. The vacated aggravated felony is not countable as a prior conviction under the criminal history score, but still triggers the sentencing enhancement of 16 levels under 2L1.2.

6. U.S. v Aranda-Hernandez, 95 F.3d 977 (10<sup>th</sup> Cir. 1996): The 10<sup>th</sup> Circuit holds that there is no *ex post facto* violation to assess a 16-level enhancement as an aggravated felony for a drug offense committed prior to 1990. Practitioners should use the current penalties at the time the defendant is found in the United States, and accept definitions of aggravated felonies at that point, not the definition in effect when the underlying felonies were committed.

7. U.S. v Reyes-Castro, 13 F.3d 377 (10<sup>th</sup> Cir. 1993): The 10<sup>th</sup> Circuit holds that attempted sexual abuse of a minor is an aggravated felony, even if no force is used or threatened, as crime involved nonconsensual act upon another, creating substantial risk that force would be used. Look only to the statutory definition, not the underlying facts, to determine if a prior conviction is an aggravated felony. See also U.S. v Lomas, 30 F.3d 1191 (9<sup>th</sup> Cir. 1994).

8. Almendarez-Torres v. United States 118 S.Ct. 1219 (1998): The Supreme Court decides that 8 § 1326 (b)(2) is a penalty enhancement only, not a separate offense, and does not have to be specifically charged in the charging document.

9. U.S. v Bencomo-Castillo 176 F.3d 1300 (10<sup>th</sup> Cir. 1999): The 10<sup>th</sup> Circuit recognizes an ex post facto concern regarding changes to the aggravated felony definition in 8 U.S.C. § 1101(a)(43)(G), relating to when a defendant is “found” in the United States, and whether he was found before or after the statute was amended. Being found does not mean simply being arrested under an alias; it means the defendant was identified by INS as a prior deportee.

10. U.S. v Galvan-Rodriguez, 169 F.3d (5<sup>th</sup> Cir. 1999): The Fifth Circuit decides that “unauthorized use of a motor vehicle” is a crime of violence and therefore an aggravated felony for purposes of applying a 16-level enhancement, because the offense involves a “substantial risk” that physical force may be used. The 10<sup>th</sup> Circuit has not addressed this specific issue, but would likely hold a similar view based on the *Gosling* line of cases.

11. U.S. v. Martinez-Villalva, 232 F.3d 1329 (10<sup>th</sup> Cir. 2000): Applying the 16-level enhancement for a prior aggravated felony does not violate the *Apprendi* decision, as *Apprendi* specifically approved of an exception as defined in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

12. U.S. v Vasquez-Flores 265 F.3d 1122 (10<sup>th</sup> Cir. 2001): Attempting to receive or transfer a stolen motor vehicle is held to be an “aggravated felony” for purposes of applying enhancements under U.S.S.G. § 2L1.2(b)(2).

13. U.S. v Vargas-Herrera, 49 Fed. Appx. 204(10<sup>th</sup> Cir. 2002) unpublished: Defendant received an enhancement pursuant to U.S.S.G. § 2L1.1(b)(5) for recklessly creating substantial risk of death or serious bodily injury. He was transporting 13 illegal aliens in a minivan, rated for maximum capacity of 7. The rear seats and seatbelts had been removed.

14. U.S. v Cruz-Sanchez, 47 Fed. Appx 914 (10<sup>th</sup> Cir. 2002) unpublished: Crime of violence, as defined App. Note 1(B)(ii) following U.S.S.G. § 2L1.2, includes burglaries of dwellings, but is not restricted to them only. Attempted burglary of a business was determined to be aggravated felony justifying 16-level increase.

15. U.S. v Zamudio, 314 F.3d 517 (10<sup>th</sup> Cir. 2002): Utah’s “plea held in abeyance” is a conviction as defined by 8 U.S.C. § 1101(a)(48)(A), thus warranting a 16-level increase under U.S.S.G. § 2L1.2(b)(1)(A) where the underlying offense was an aggravated felony.

16. U.S. v Mares-Martinez, 329 F.3d 1204(10<sup>th</sup> Cir. 2003): An organizer/leader of a alien smuggling operation

can be held accountable for creating substantial risk of death or serious bodily injury when the organizer/leader is not the driver of the vehicle.

17. U.S. v Candejas, 347 F.3d 853(10<sup>th</sup> Cir. 2003): A sentencing court may look beyond the elements of the offense to the underlying facts of the case to determine when and if a conviction for transporting and harboring illegal aliens is an alien smuggling offense committed “for profit,” thus qualifying as an aggravated felony. Because “for profit” is not an element of offenses involving transporting and harboring illegal aliens, a categorical approach is insufficient to classify such offenses.

18. U.S. v Lucio-Lucio, 347 F.3d 1202 (10<sup>th</sup> Cir. 2003): Felony DUI is not a crime of violence pursuant to 18 U.S.C. § 16(b), because it does not, by its nature, pose a substantial risk that physical force may be used in the commission of the offense. In so holding, 10<sup>th</sup> Circuit overrules *Tapia Garcia v INS*, 237 F.3d 1215 (10<sup>th</sup> Cir. 2001). Therefore, felony DUI cannot be an aggravated felony under Immigration law, warranting 8-level increase, unless the language of the elements of the offense specify elevated state of recklessness. It appears that Farnsworth, (see # 22, Penalty Enhancements) is still good case law, because the definition of “crime of violence” in U.S.S.G. § 4B1.2 is significantly broader than the one found in 18 U.S.C. § 16.

19. U.S. v Venegas-Ornelas, 348 F.3d 1272 (10<sup>th</sup> Cir. 2003): First Degree Criminal Trespass, as defined in Colorado State law, is considered a crime of violence under 18 U.S.C. § 16(b), and is therefore an aggravated felony.

20. U.S. v Torres-Ruiz, 387 F.3d 1179 (10<sup>th</sup> Cir. 2004): This case extends the Lucio-Lucio decision and holds that for a felony DUI to qualify as a crime of violence under 18 U.S.C. 16, there must be the intentional use of force against the person or property of another.

21. Leocal v Ashcroft, 125 S.Ct. 377 (2004): The Supreme Court uses the same rationale of *Torres-Ruiz* above to hold that a felony DUI resulting in bodily injury is not a crime of violence under 18 U.S.C. § 16, and thus not an aggravated felony.

22. U.S. v Herrera-Roldan, 414 F.3d 1238(10<sup>th</sup> Cir. 2005): A Texas statute that prohibits possession of more than 50 pounds, but less than 2000 pounds, of marijuana is considered an aggravated felony but not a “drug trafficking offense” since the statute does not contain language “possess with intent to distribute.”

23. U.S. v Perez-Vargas, 414 F.3d 1282 (10<sup>th</sup> Cir. 2005): The Colorado statute of Third Degree Assault is determined to not meet the definition of “crime of violence” as defined in 18 U.S.C. § 16, and the lack of a charging document or other “approved” document results in a reversal of an enhancement for a crime of violence, even when the underlying facts, which are ignored, are that the defendant engaged in a drive-by shooting in which five individuals were injured.

24. U.S. v Luis Hernandez-Garduno, 460 F.3d 1287 (10<sup>th</sup> Cir. 2006): A prior conviction for Third Degree Assault under Colorado state law is either a felony conviction or an aggravated felony conviction depending upon the analysis per Perez-Vargas (see above). The determination is to be made looking to those documents approved in *Shepard v United States*.

25. U.S. v Saenz-Gomez, 472 F.3d 791 (10<sup>th</sup> Cir. 2007): The defendant was convicted of Possession of Heroin with Intent to Distribute, and he was sentenced to a suspended prison term and placed on probation. Before his attorney filed a notice to appeal, he was deported. He returned illegally, and was charged with having re-entered after sustaining an aggravated felony conviction. He argued that, because he was deported before he had exhausted his appellate rights, his conviction was not final, and he could not be considered to have an aggravated felony conviction. The Tenth Circuit disagreed, finding that the definition of “conviction” in section 1101(a)(48)(a), requires only that a formal judgment of guilt has been entered. There is no finality requirement in the statute.

26. Lopez v Gonzales, 127 S.Ct. 625 (2006): Possession of a controlled substance under state law is often a felony offense, but Possession of a Controlled Substance under federal law is a misdemeanor under the Controlled Substances Act. Because Possession of a Controlled Substance is not a “drug trafficking crime” under the Immigration and Nationality Act, a state felony conviction for Possession of a Controlled Substance cannot be considered an aggravated felony conviction under Immigration law or the Sentencing Guidelines. This case directly overrules *U.S. v Cabrera-Sosa*, 81 F.3d 998 (10<sup>th</sup> Cir. 1996) cert. denied, 117 S.Ct. 218 (1996).

27. U.S. v Hernandez-Rodriguez, 388 F.3d 779 (10<sup>th</sup> Cir. 2004) and U.S. v Gonzalez-Coronado 419 F.3d 1090 (10<sup>th</sup> Cir. 2005): These cases address the term “one year imprisonment” as used in the definition of Aggravated Felony under 8 U.S.C. § 1101(a)(43). Per *Hernandez-Rodriguez*, a 365-day jail sentence with 305 days suspended, is a term of one year imprisonment. However, per *Gonzalez-Coronado*, a sentence of straight

probation does not qualify, where no jail or prison term is suspended.

28. U.S. v Ortuno-Caballero, 187 Fed.appx. 814, 2006 WL 1785360 (10<sup>th</sup> Cir. (NM)): A First Degree Criminal Trespass might be an “aggravated felony,” because it fits the definition of “crime of violence” found in 18 U.S.C. § 16; however, it does not fit the “crime of violence” definition in Application Note 1B(iii) following U.S.S.G. § 2L1.2. Thus, it qualifies for the eight offense level increase, but not 16 levels. Judge O’Brien gives a comprehensive overview of the various “crime of violence” definitions.

29. U.S. v Huyoa-Jimenez, 623 F.3d 1320 (10<sup>th</sup> Cir.2010): Where a defendant receives a totally suspended prison sentence and is placed on probation for a drug trafficking offense, there should be an 8-level increase as an aggravated felony rather than the 12-level increase for “sentence of 13 months or less.”

30. U.S. v Rosales-Garcia, 2012 WL 375518 (10<sup>th</sup> Cir. 2012): The defendant had a state drug trafficking conviction and was put on probation and deported. He re-entered, was apprehended, and revoked on the state offense, receiving a 15-year sentence. He was then prosecuted for Illegal Re-Entry. The Court determined the prior drug offense should result in a 16-level increase due to the length of sentence imposed, but the defendant argued that at the time he re-entered, his prior sentence was only a sentence of probation. The 10<sup>th</sup> Circuit agreed with the defendant. It is the length of the prior sentence at the time of re-entry that determines how to treat the prior conviction.

31. U.S. v. Huizar, 2012 WL 3044930 (10<sup>th</sup> Cir. 2012): The California Burglary of Dwelling statute (P.C. 459) encompasses conduct that is broader than a “generic” residential burglary, and additional Taylor-approved documents are necessary to establish “burglary of a dwelling” for purposes of applying a crime of violence enhancement in the Immigration guideline.

## **X. More Than Minimal Planning** (Eliminated as to Theft/Fraud by 11-1-01 Guidelines Manual)

## **XI. Victim 3A1.1**

1. U.S. v Blackwell, 323 F.3d 1256 (10<sup>th</sup> Cir. 2003): While an enhancement for role in the offense should be based upon all relevant conduct, an adjustment for “victim” is restricted to a victim of the offense of conviction. Therefore, in a Felon in Possession case, it was error to provide an enhancement for threatening a police officer with the firearm, since an individual cannot be a “victim” of Felon in Possession.

## **XII. Role 3B1.1**

1. U.S. v Cruce 968 F.2d 21 (10<sup>th</sup> Cir. 1994): More than minimal planning and aggravating role can both be applied in the same case.

2. U.S. v Eldon James 157 F.3d 1218 (10<sup>th</sup> Cir. 1998): The 10<sup>th</sup> Circuit joins the majority of Circuits in holding that a downward adjustment for minor or minimal participant is not appropriate when a defendant is only held accountable for drugs directly attributable to him rather than all drugs distributed by all members of the conspiracy. ***Invalidated after 11-1-01 per change in Guidelines Manual.***

3. U.S. v Ayers, 84 F.3d 382 (10<sup>th</sup> Cir. 1996): The 10<sup>th</sup> Circuit upheld a District Court ruling that knowingly permitting a codefendant to sell drugs from one’s apartment was an important function, and the defendant was not entitled to a mitigating role reduction as a minimal or minor participant.

4. U.S. v Arredondo-Santos, 911 F.2d 424 (10<sup>th</sup> Cir. 1990): As demonstrated by this case, the 10<sup>th</sup> Circuit has refused to adopt a per se rule that drug couriers are automatically entitled to a minor role reduction, finding them to play an “important function” in drug distribution networks. To determine if a role adjustment is appropriate, there must be evidence in the record of other participants and their role in the criminal activity. One who transports drugs is no less culpable than he who sells the drugs.

5. U.S. v Kravchuk, 335 F.3d 1147(10<sup>th</sup> Cir. 2003): A defendant, who is 18-21 years old, may receive an enhancement for use of a minor to commit a crime per U.S.S.G. § 3B1.4.

### **XIII. Obstruction 3C1.1**

1. U.S. v Arthur Gilbert 72 F.3d 139 (10<sup>th</sup> Cir. 1995): Providing false information to Pretrial Services Officer in order to be granted pretrial release is material for purposes of applying 3C1.1.
2. U.S. v Gacnik 50 F.3d 848 (10<sup>th</sup> Cir. 1995): Concealing evidence prior to knowing an official investigation has begun is **not** obstruction.
3. U.S. v Glover 52 F.3d 283 (10<sup>th</sup> Cir. 1995): Application of 2J1.3 and 2X3.1 (perjury and X-reference to underlying offense). Treat as Acc. after the fact even if the defendant is not an accessory.
4. U.S. v Douglass Nelson, 54 F.3d 1540 (10<sup>th</sup> Cir. 1995): Failure to disclose existence of bank account, regardless of the amount of money in it at a given time, could influence the sentencing court's decision and is therefore material under 3C1.1.
5. U.S. v Sharon Dunnigan, 113 S.Ct. 1111 (1993): An obstruction of justice enhancement is **required** under the Sentencing Guidelines if the accused has committed perjury at trial. The Supreme Court rules the right to testify **does not** include the right to commit perjury. If the defendant objects to a sentencing enhancement resulting from trial testimony, the District Court must review the evidence and make independent findings necessary to establish a **willful** attempt to testify falsely, and not due to confusion, mistake or faulty memory.
6. U.S. v Roman Hankins 127 F.3d 932 (10<sup>th</sup> Cir. 1997): In the case where a defendant attempted to have evidence concealed that had, unbeknownst to the defendant, already been seized, the 10<sup>th</sup> Circuit said an enhancement for Obstruction of Justice was still warranted.
7. U.S. v. Lofton 905 F.2d 1315 (9<sup>th</sup> Cir. 1990): Obstruction of Justice enhancement for continued criminal conduct is warranted where defendant falsely claimed to accept responsibility for his offense, thereby rendering his assertion of accepting responsibility a material falsehood to Probation Officer. Obstruction enhancement may also have been justified due to additional resources being expended by government for investigating ongoing criminal conduct.
8. U.S. v Parker, 594 F.3d 1243 (10<sup>th</sup> Cir. 2010): An obstruction of justice enhancement is warranted where a defendant testified falsely at a suppression hearing regarding whether he had given consent to search his residence.

### **XIV. Multiple Counts 3D1.1**

1. U.S. v Baeza-Suchil 52 F.3d 898 (10<sup>th</sup> Cir. 1995): Felon in Possession count and Illegal Re-entry count are not groupable under 3D1.2(a) because the societal harms are different.
2. U.S. v Lindsay, 184 F.3d 1138 (10<sup>th</sup> Cir. 1999): The 10<sup>th</sup> Circuit holds that tax counts and fraud counts are not to be grouped under 3D1.2(d) because different societal harms are implicated. This is true even if the tax counts relate to non-reporting of the income gained by the fraudulent conduct in question.
3. U.S. v Peterson, 312 F.3d 1300 (10<sup>th</sup> Cir. 2002): This case holds that tax evasion and mail fraud counts are not groupable, as they affect different victims (the victim of a mail fraud is an individual, while the victim of tax evasion is society as a whole). The counts are not to be grouped even when an enhancement is added to the tax evasion guideline for failing to report income exceeding \$10,000 from illegal activity, where the income was produced by the related mail fraud.

### **XV. Acceptance of Responsibility**

1. U.S. v Julio Ortiz, 63 F.3d 952 (10<sup>th</sup> Cir. 1995): The 10<sup>th</sup> Circuit indicates that an offender whose trial commences and then enters a guilty plea, may get the additional one point reduction for "timely providing

complete information to the government concerning his own involvement in the offense" pursuant to 3E1.1(b)(1).

2. U.S.v Purchess, 107 F.3d 1261 (7th Cir. 1997): A defendant may remain silent about relevant conduct per 3E1.1, but may not falsely deny or frivolously contest relevant conduct. In a case where the defendant remains silent, but the defendant's attorney frivolously contests relevant conduct, the 7th Circuit says the District Court should determine if it is clear that the defendant understood and agreed with his attorney's arguments; if so, the Court would be justified in denying acceptance of responsibility, but if not, the Court should not penalize the defendant.

3. U.S. v Prince, 204 F.3d 1021 (10<sup>th</sup> Cir.2000): The 10<sup>th</sup> Circuit joins the majority of Circuits in holding that the Guidelines do not prohibit a sentencing court from considering, in its discretion, criminal conduct unrelated to the offense of conviction in determining whether a defendant qualifies for an adjustment for acceptance of responsibility.

4. U.S. v Moreno-Trevino, 432 F.3d 1181(10<sup>th</sup> Cir. 2005): The U.S. Attorney's Office has the same discretion in filing a motion for the third level of acceptance of responsibility as for filing a Substantial Assistance Motion.

5. U.S. v Munoz-Nava, 524 F.3d 1137 (10<sup>th</sup> Cir. 2008): The District Court did not err in granting a third level for acceptance of responsibility over the government's objection, which was based only on the fact that the defendant had taken six weeks after arrest to indicate his willingness to plead guilty, and where the United States had not engaged in any trial preparation.

## **XVI. Criminal History 4A1.1**

1. U.S. v Wilson 41 F.3d 1403 (10th Cir. 1994): Custody of Family Services is "incarceration" for counting prior conviction. Also, bail jumping is not "related case" for underlying offense and should get separate criminal history points even if consolidated for sentencing.

2. U.S. v Steven Charles Martin 30 F.3d 142 (10th Cir. 1994): It is the defendant's burden to prove prior convictions are infirm. The government does not have to prove they are valid.

3. News and Views dated 7-18-94. In Nichols v U.S., 114 S.Ct. 1921 (1994), the Court ruled an uncounseled misdemeanor conviction that did not result in incarceration may be used to enhance a sentence for a subsequent conviction. In Custis v U.S., 114 S.Ct. 1732 (1994), the Court ruled a defendant may not collaterally attack the validity of a prior conviction used to enhance a sentence under the Armed Career Criminal Act (18 U.S.C. 924 e). The sole exception to the rule is if the conviction was obtained in violation to the right to counsel.

4. U.S. v Birch 39 F.3d 1089 (10th Cir. 1994): 10th Circuit rules placement in a juvenile detention center is "confinement" within meaning of USSG 4A1.2 (d)(2)(A).

5. U.S. v Garcia 42 F.3d 573 (10th Cir. 1994): Defendant cannot collaterally attack a prior Nolo plea.

6. U.S. v Alberty 40 F.3d 1132 (10th Cir. 1994): Unrelated cases "ordered" to be consolidated for sentencing are always to be treated as "consolidated" and assigned only one set of crim. history points.

7. U.S. v Wyne 41 F.3d 1405 (10th Cir. 1994): Definition of "serious dissimilar" convictions for upward departure purposes does not include non-violent misdemeanors. In this case, 14 prior misdemeanor convictions do not warrant departing upward from crim. hist. category I.

8. U.S. v Strevel, 85 F3d 501 (11th Cir. 1996). Bail forfeiture is a valid conviction under Georgia law. No 10th Circuit cases on this issue.

9. U.S. v Klump, 57 F.3d 801 (9th Cir. 1995): This case, the first decision of its kind, holds that if a defendant appeals his conviction, and wins the right to a new sentencing hearing, any convictions on unrelated cases sustained between the date of the original sentencing hearing and the subsequent hearing may be used in calculating the new criminal history.

10. U.S. v William D. Kirtley, 986 F.2d 285 (8th Cir. 1993): The 8th Circuit ruled that assigning six criminal history points (three pursuant to 4A1.1(a), two per 4A1.1(d) and one per 4A1.1(e)), was not a violation of double jeopardy. Apparently, no other Circuit has addressed this issue.

11. U.S.v Curtis A. Hines, Sr. 133 F.3d 1360 (10th Cir. 1998): According to the 10th Circuit, expunged convictions are countable unless the expungement was related to "constitutional invalidity, innocence, or errors of law..." Simply because a conviction has been expunged does not mean it is uncountable under 4A1.2(j). It is the

reason behind the expungement that matters. Convictions expunged to restore civil rights or to remove the stigma of a criminal conviction are counted for criminal history purposes.

12. U.S. v Woods, 976 F.2d 1096 (7th Cir. 1992): Excellent discussion of “common scheme or plan” as defined under 4A1.2, App. Note 3 (Related Cases). Common scheme or plan as defined here is not nearly as broad as its definition under 1B1.3 (Relevant Conduct). A common modus operandi is not sufficient to consider prior convictions related. They must be inextricably linked to one another. 10th Cir. case law is cited in the opinion.

13. U.S. v. Horek, 137 F.3d 1226 (10th Cir. 1998): The issue addressed by the 10th Circuit is whether community confinement, imposed as a condition of probation, should be credited as incarceration toward a sentence of imprisonment imposed later upon revocation of probation. The answer, according to the 10th Circuit, is “No.” Even though the community confinement is a substitute for incarceration, if it imposed as a condition of probation under 5C1.1, it is not imprisonment.

14. U.S. v Robert D. Reed, 153 F.3d 729 (10<sup>th</sup> Cir. 1998): Citing U.S. v Simpson, 94 F.3d 1373, 1380 (10<sup>th</sup> Cir. 1996), the 10<sup>th</sup> Circuit re-affirms that a certified docket sheet establishes by a preponderance of the evidence that a conviction is valid, absent any evidence to the contrary by a defendant. A claim by the defendant that he was denied his rights or did not plead guilty is not sufficient evidence to the contrary. Also, a separate charge of FTA, carrying a separate penalty imposed concurrently(or, by inference, consecutively) to the underlying offense, is to be counted separately under the Guidelines if there is an intervening arrest.

15. U.S. v Walling, 936 F.2d 469 (10<sup>th</sup> Cir. 1991). The question of “related cases” referred to in U.S.S.G. 4A1.2(a)(2) refers to the relationship between prior offenses, not to the relationship between prior offenses and the instant offense. Refers to U.S. v Banashefski, 928 F.2d 349 (10<sup>th</sup> Cir. 1991).

16. U.S. v Ceballos-Rios 182 F.3d 933, 1999 WL 258327 (10<sup>th</sup> Cir. (Colo))unpublished: This is an unpublished opinion concerning a defendant’s claim that a certain prior conviction was not his. The 10<sup>th</sup> Circuit determined it was, based on court records. The Court recognizes that Probation Officers are “reliable sources” and that courts may take judicial notice of public documents, such as conviction records. Also, the 10<sup>th</sup> Circuit stated that a defendant does not have to be aware he is under a criminal justice sentence to apply §4A1.1(d).

17. U.S. v Andre McGee, 194 F.3d 1321, 1999 WL 704288 (10<sup>th</sup> Cir. N.M.), Unpublished: The 10<sup>th</sup> Circuit allows diversionary sentences from California to be counted, based upon uncertified docket printouts, in spite McGee’s willingness to swear that he never entered a nolo plea in one of the cases.

18. U.S. v Perez de Dios, 237 F.3d 1192 (10<sup>th</sup> Cir.2001): The 10<sup>th</sup> Circuit holds that “No Insurance” is a countable misdemeanor conviction. Because a term of probation of one year was imposed, the Court does not find it necessary to answer whether or not, in order to be countable, a term of one year probation or 30 days jail must be imposed, as required by § 4A1.2(c)(1), but that would appear to be a logical conclusion.

19. U.S. v Torres, 182 F.3d 1156 (10<sup>th</sup> Cir. 1999): When the conduct in the instant federal offense is associated with other criminal conduct (e.g., Felon in Possession of Firearm growing out of a traffic stop involving DUI, Possession of Marijuana), the decision whether to treat a non-federal conviction as relevant conduct to the instant offense involves a hybrid approach in looking at, not only whether the prior offense involves conduct that influences the base offense level or other specific offense characteristic, but the similarity, temporal proximity and regularity of the instant offense and the prior sentence.

20. U.S. v Whitney, 229 F.3d 1296 (10<sup>th</sup> Cir. 2000): It is not clear error for a U.S. District Court to conclude a conviction for Minor in Possession of alcohol is not a juvenile status offense where the defendant is 18 years old or older, and his conduct would have been criminal if committed by an adult (he was possessing alcohol while driving a vehicle).

21. U.S. v Tigney, 367 F.3d 200 (4<sup>th</sup> Cir. 2004): In a case of first impression, the Fourth Circuit concludes that Failure to Appear is an offense similar to Contempt of Court, and must receive a 30 day jail sentence or one year probation to be a countable conviction.

22. U.S. v Corchado, 427 F.3d 815 (10<sup>th</sup> Cir. 2005): Alemendariz-Torres is clarified as extending to facts about a prior conviction, and subsidiary findings, such as whether or not a defendant was on probation when he committed the instant offense. Such facts may be determined by a judge without violating the Sixth Amendment.

24. U.S. v Mendez-Lopez, 338 F.3d 1153 (10<sup>th</sup> Cir. 2003): The Tenth Circuit strongly suggests that Fleeing Police is a countable misdemeanor regardless of the sentence, as it is not similar to Resisting Arrest or Interference with a Peace Officer.

25. U.S. v Humphries, 429 F.3d 1275(10<sup>th</sup> Cir. 2005): The Tenth Circuit determines that U.S. District Courts must be given deference in regard to whether prior sentences are related, and refuses to apply de novo review.

26. U.S. v Hernandez-Castillo, 449 F.3d 1127 (10 Cir. 2006): This California Wobbler case notes that a prior sentence of probation for a conviction of Unlawful Sexual Intercourse with a Minor is a crime of violence and, therefore, an aggravated felony, but would have been only a misdemeanor conviction had he been sentenced to a county jail term.
27. U.S. v Martinez-Jimenez, 464 F.3d 1205 (10<sup>th</sup> Cir. 2006): The Tenth Circuit holds that, absent evidence by the defendant to the contrary, evidence of a conviction entered on the defendant's NCIC rap sheet is persuasive to establish a conviction belongs to the defendant even if an alias was used because the entries are based on fingerprint analysis.
28. U.S. v Zuniga-Chavez, 464 F.3d 1199 (10<sup>th</sup> Cir. 2006), cert. denied, 127 S.Ct. 1313 (2007): In some cases, uncertified documents may be sufficient to establish prior convictions. A summary obtained from a state court clerk may be sufficiently reliable evidence, if the defendant fails to present any persuasive contradictory evidence.
29. U.S. v Pech-Aboytes, 562 F.3d 1234 (10<sup>th</sup> Cir. 2009): A nunc pro tunc order was filed in state court to discharge a term of probation that had expired, because the defendant had been on supervision at the time of the instant offense. Thus, he did not qualify for Safety Valve because of the extra points for being under supervision. The District Court ruled the defendant's manipulations were ineffective, and did not apply Safety Valve. The defendant appealed, and the Tenth Circuit upheld the District Court.
30. U.S. v Minton, 2011 WL 135770 (10<sup>th</sup> Cir. 2011) Unpublished: When a Wyoming District Court credits presentence confinement against a prison sentence that is then suspended, the presentence confinement period is treated as a term of incarceration for criminal history point determination.
31. U.S. v Blocker, 612 F.3d 413 (5<sup>th</sup> Cir. 2010): A sentence that is beyond the time limits of § 4A1.2(e)(3) is not "otherwise countable" and an outstanding probation violation warrant on an uncountable conviction does not result in points under § 4A1.1(d) for committing the instant offense while under a criminal justice sentence.

## **XVII. Penalty Enhancements, including Career Offender**

1. U.S. v Allen 24 F3d 1180 (10th Cir.): U.S. Attorney must file Information to seek enhanced **statutory** penalty, but no Information is required for Career Offender enhancement under 4B1.2 because the increase in sentence does not expand the statutory maximum.
2. Taylor v U.S. 110 S.Ct. 2143 (1990): "Burglary" within meaning of sentence enhancement statute (18 U.S.C. 924(e)) refers to conviction of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure with the intent to commit a crime. The burglary does not have to involve an occupied dwelling.
3. U.S. v Richard Smith, 10 F.3d 724 (10th Cir. 1993): The Sentencing Commission specifically rejected using any other burglary than Burglary of a Dwelling from the definitions of "crime of violence" for purposes of applying Career Offender (4B1.1). The 10th Circuit indicates the "Otherwise" phrase of 4B1.1, which includes other offenses that by their nature pose a substantial risk of danger, will be narrowly construed for burglaries that do not involve burglary of a dwelling. In this case, a commercial burglary of a building that is sometimes occupied, but was not occupied at the time of the burglary, was not considered a predicate felony for 4B1.1.
4. U.S. v LaBonte, 117 S.Ct. 1673 (1997): The statutory maximum for applying Career Offender **does** consider any enhanced statutory maximum due to a prior conviction for a crime of violence or controlled substance offense.
5. U.S. v Richard Smith, 10 F3d 724 (10th Cir. 1993): This is the same case as #3 above, but a different emphasis. To determine whether a prior felony qualifies as a predicate felony for applying "Career Offender", the Court may look beyond the count of conviction, but the search is limited to "the charging papers, judgement of conviction, plea agreement or other statement by the defendant for the record, presentence report adopted by the court, and findings by the sentencing judge".
6. U.S. v Gosling (Overturned by Chambers), 39 F.3d 1140 (10th Cir. 1994): The 10th Circuit holds that a crime of Escape qualifies as a "crime of violence" as defined under USSG 4B1.2(1), because escaping from a county jail "by its nature presented a serious potential risk of physical injury to another". The 10th Circuit indicated an examination of the underlying offense conduct was unnecessary, because even if the offender flees by stealth, there is always the great potential for physical injury.



7. U.S. v Clanton T. Bennett 108 F.3d 1315 (10th Cir. 1997): The issue here is attempting to establish a burglary conviction as a predicate felony for Career Offender purposes. Bennett had been convicted of Second Degree Burglary, which contains generic language about buildings, rooms, tents, automobiles, trucks, etc. He had originally been charged with First Degree Burglary, and the Information clearly indicated Bennett had entered an occupied residence. However, the amended Information could not be located. The U.S. District Judge indicated the Information could only have been amended to remove a specific reference to the dwelling being occupied, and must have left intact the word "dwelling", and thus considered the conviction as a predicate felony. The 10th Circuit overruled, and indicated it is irrelevant what crime was committed, or even if the defendant was actually innocent. What is important is of what he was **convicted**, and speculation is not allowed about what a charging document probably said. Career Offender provisions must be narrowly construed. The conviction was disallowed as a predicate felony.
8. U.S. v James Manuel Romero 122 F.3d 1334 (10th Cir. 1997): The 10th Circuit rules that possession of a deadly weapon by an inmate in a prison is always a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B), which language is identical to the Career Offender provisions of U.S.S.G. 4B1.2. The Court quoted a 9th Circuit opinion, U.S. v Young, 990 F.2d 469,472 (9th Cir. 1993) and said: "...By its nature, therefore, the possession of a deadly weapon by a prison inmate presents a serious potential risk of physical injury to another." This reference was made in concluding that such an offense was a "crime of violence" under U.S.S.G. 4B1.2.
9. U.S. v Mitchell (Overturned by Chambers) 113 F.3d 1528 (10th Cir. 1997): The 10th Circuit rules that walking away from an unsecured correctional facility, such as a community treatment center or halfway house, is a "crime of violence" as defined in U.S.S.G. 4B1.1 (Career Offender). See also U.S. v Michael Mason 125 F.3d 863 (10th Cir. 1997). (Overruled by *Chambers*)
10. U.S. v Billy Ross Moudy (Overturned by Chambers), 132 F.3d 618 (10th Cir. 1998): The 10th Circuit holds that Escape and Attempted Escape are predicate felonies under ACCA per U.S. v Gosling, 39 F.3d 1140 (10th Cir. 1994), a case in which an Escape was considered a "crime of violence" under 4B1.2(1)(ii).
11. U.S. v William Johnson, 973 F.2d 857 (10th Cir. 1992): Sentencing under the Armed Career Criminal Act, 18 U.S.C. 924(e), is a penalty enhancement that does not require an Information to be filed by the Government, and is mandatory if the defendant meets the criteria.
12. U.S. v. Oberle, 136 F.3d 1414 (10th Cir. 1998): 10th Circuit addresses "Three Strikes" law, 18 U.S.C. 3559(c), and holds that while a defendant must be given prior notice by the government of which convictions form the basis of the sentencing enhancement, per 21 U.S.C. 851(a), the remaining subsections, (b) and (c), do not apply to Three Strikes enhancement, and the underlying convictions do not have to be proven beyond a reasonable doubt.
13. U.S. v. Gottlieb, 140 F.3d 865 (10th Cir. 1998): The definition of "use" of a firearm in relation to a predicate felony per the "Three Strikes" law, 18 U.S.C. 3559(c), is held to be identical to the definition of "use" as defined in 18 U.S.C. 924(c) and the Bailey decision.
14. U.S. v Tisdale, 921 F.2d 1095 (10th Cir. 1990) and U.S. v Brame, 997 F.2d 1426 (11th Cir. 1993): Every Circuit Court that has examined 924(e) has ruled that the maximum statutory penalty is life imprisonment.
15. U.S. v Coronado-Cervantes 154 F.3d 1242 (10th Cir. 1998): The 10th Circuit holds that the offense of Sexual Contact with a Minor is a crime of violence as defined by U.S.S.G. §§ 4B1.1 and 4B1.2. Even though no force or threat of force was involved, the Court determined such an offense always involves a substantial risk that violence will be used.
16. U.S. v Richardson, 166 F.3d 1360 (11th Cir. 1999): This case, which cites several supporting cases and no conflicting cases, holds that for purposes of applying the Armed Career Criminal enhancement, the predicate offenses must have resulted in conviction prior to the *commencement* of the instant Felon in Possession, rather than simply prior to *sentencing*.
17. U.S. v. Green, 967 F.2d 459 (10th Cir. 1992): In determining application of Armed Career Criminal guideline enhancement, it is proper to enhance a defendant's sentence based on three prior violent felony or controlled substance offenses, even though those three convictions were the result of a single judicial proceeding as long as they were committed on different occasions.
18. U.S. v Dwyer 245 F.3d 1168 (10th Cir. 2001): The 10th Circuit holds that possession of an unregistered firearm is a crime of violence for Career Offender purposes as defined in U.S.S.G. § 4B1.2.
19. U.S. v Riggans, 254 F.3d 1200 (10th Cir. 2001): The 10th Circuit allows a "conduct-specific inquiry when considering whether the instant offense is a crime of violence." Bank Larceny, in which Riggans said he would

shoot someone (although no gun was found) was considered by the District Court to be a crime of violence under the “otherwise” clause of U.S.S.G. § 4B1.2(a)(2). While the examination of prior convictions is limited to a “categorical” approach (i.e., the elements of the offense of conviction), this limitation does not apply to considering whether the instant offense is a crime of violence.

20. U.S. v Farnsworth, 92 F.3d 1001 (10<sup>th</sup> Cir. 1996): The 10<sup>th</sup> Circuit holds that Vehicular Manslaughter is a crime of violence under the “otherwise” clause of U.S.S.G. § 4B1.2. It relies upon and agrees with *U.S. v Rutherford* 54 F.3d 370 (7<sup>th</sup> Cir. 1995) which held that DUI is a “reckless act that often results in injury, and the risks of driving while intoxicated are well known. This is sufficient to satisfy the ‘serious risk’ standard of the ‘otherwise’ clause of § 4B1.2(1)(ii).”

21. U.S. v Moyer, 282 F.3d 1311 (10<sup>th</sup> Cir. 2002): As a follow-up to Johnson, supra, the 10<sup>th</sup> Circuit holds that, not only does the government not have to file an Information to apply Armed Career Criminal under 924(e), but the statutory penalty is 15 years to life regardless of what substantive statute and penalty provision is cited in the charging document. A “felon in possession” case, with three qualifying priors, is automatically subject to 924(e) penalties even if the Indictment’s penalty provision is cited as , e.g., 924(a)(2).

22. U.S. v Lucio-Lucio, 347 F.3d 1202(10<sup>th</sup> Cir. 2003): Felony DUI is not a crime of violence pursuant to 18 U.S.C. § 16(b), because it does not, by its nature, pose a substantial risk that physical force may be used in the commission of the offense. In so holding, 10<sup>th</sup> Circuit overrules *Tapia Garcia v INS*, 237 F.3d 1215 (10<sup>th</sup> Cir. 2001). Therefore, felony DUI cannot be aggravated felony under Immigration law, warranting 8-level increase, unless the language of the elements of the offense specify elevated state of recklessness. It appears that Farnsworth, supra, is still good case law, because the definition of “crime of violence” in U.S.S.G. § 4B1.2 is significantly broader than the one found in 18 U.S.C. § 16.

23. U.S. v Venegas-Ornelas, 348 F.3d 1273(10<sup>th</sup> Cir. 2003): First Degree Criminal Trespass, as defined in Colorado State law, is considered a crime of violence under 18 U.S.C. § 16(b), and is therefore an aggravated felony. The case makes clear that First Degree Criminal Trespass would also be considered a crime of violence as defined under the “otherwise” clause of U.S.S.G. § 4B1.2.

24. Shepard v United States, 125 S.Ct. 1254 (2005): Decided March 7, 2005, Shepard reaffirms the holding in Taylor, and refuses to expand the inquiry of whether a burglary conviction from a “non-generic” state is in fact a generic burglary. Specifically, the court may look to the terms of the charging document, the terms of a plea agreement, or transcript of colloquy between judge and defendant while outlining a factual basis, or to some comparable judicial record of this information. Shepard further erodes *Alemendarez-Torres*, and draws a distinction between the fact of a prior conviction, and facts about the prior conviction. Facts about a prior conviction must be proven beyond a reasonable doubt.

25. United States v Moore, 420 F.3d 1218 (10<sup>th</sup> Cir. 2005): Felony Driving Under the Influence is a crime of violence as defined in the “otherwise” clause of U.S.S.G. § 4B1.2. (Overruled by Begay)

26. United States v Cornelio-Pena, 435 F.3d 1279 (10<sup>th</sup> Cir. 2006): Solicitation to Commit Burglary of a Dwelling is a crime of violence.

27. U.S. v Munro, 394 F.3d 865(10<sup>th</sup> Cir. 2005): Use of a Computer to Attempt to Persuade a Minor to Engage in Illegal Sexual Acts is a crime of violence per 18 U.S.C. 924(c)(3) because its nature involves a substantial risk that physical force may be used in the course of committing the offense. A categorical approach is used, not dependent upon the facts of the case, which involved on-line chats with an undercover police officer and a trip to meet the minor female while armed with a handgun.

28. James v United States, 127 S.Ct. 1586 (2007): Attempted Burglary is a violent felony under the ACCA, because the conduct involves the possibility of a face-to-face contact between the burglar and a third party: occupant, police officer, or bystander. The Florida statute criminalizes conduct that involves attempt to enter a structure, and not merely preparatory conduct.

29. United States v Fell, 511 F.3d 1035 (10<sup>th</sup> Cir. 2007): Using the criteria from James v United States, supra, the Tenth Circuit concludes that Conspiracy to Commit Burglary under the Colorado statute is not a crime of violence because specific overt acts may criminalize only preparatory conduct and not address actual risk of illegal entry.

30. U.S. v Rodriguez-Enriquez, 518 F.3d 1191 (10<sup>th</sup> Cir. 2008): The Tenth Circuit holds that a felonious assault committed by drugging a victim is not a crime of violence because there is no use of physical force against the person of another. Physical force is equated with mechanical force; therefore, unless the poison were forcibly poured down the victim’s throat, the offense is not a crime of violence. They did not address what would happen if

the victim died, and the defendant was charged with murder...this is a very odd case.

31. Begay v United States, 128 S.Ct. 1581 (2008): This case holds that felony DUI is not a crime of violence under the “otherwise” clause of the Armed Career Criminal Act, because drinking and driving does not involve the “purposeful, violent and aggressive” conduct that Congress intended to address in this statute.

32. U.S. v Zuniga-Soto, 527 F.3d 1110 (10<sup>th</sup> Cir. 2008): This case examines whether a conviction of a Texas statute in light of Begay, and the Tenth Circuit concludes that reckless conduct does not establish a crime of violence per 18 U.S.C. § 16. That issue had not been resolved in Begay. Furthermore, the Tenth Circuit specifically rejected even a categorical approach to examining an element of an offense, finding that it was improper to look at a charging document, plea colloquy, judgment or any other approved document under Shepard to see if, as is the case with the Texas assault statute, some of these documents would establish the bodily injury was caused knowingly or intentionally, as opposed to recklessly. Because any of those three would satisfy a conviction under that statute, and recklessness was insufficient to establish conduct that was “purposeful, violent and aggressive,” the conviction could not be considered a crime of violence on its face. This case would seem to sound the death knell for using a felony DUI or even vehicular homicide as a predicate felony for any enhancement based on 18 U.S.C. § 16 or a derivative, where the phrase “use of physical force” is embraced.

33. U.S. v Rodriquez, 128 S.Ct. 1783 (2008): The Supreme Court holds that under ACCA provisions, determining whether a state “serious drug offense” has a statutory maximum penalty prescribed by law of 10 years or more is to be determined after any recidivist provisions are triggered by the state law. In the case at bar, the defendant was sentenced in Washington state to three concurrent terms of 48 months imprisonment for drug offenses. The first count had a maximum penalty of five years, but the second and third counts had maximum penalties of 10 years, because the Washington statute prescribed a 10-year maximum for “second or subsequent offenses.”

34. U.S. v Hill, 539 F.3d 1213 (10<sup>th</sup> Cir. 2008): Based on *Rodriquez*, supra, the Tenth Circuit remanded the case back to the panel for rehearing. Hill had a presumptive guideline range of 9-11 months on an underlying Kansas felony of Criminal Possession of a Firearm. However, the statutory guideline range for a Class VIII felony was 7 to 23 months. Initially, the panel decided Hill did not have a prior felony conviction because the top of his presumptive guideline range was less than one year. In light of *Rodriquez*, however, this holding will not likely survive on rehearing, because the offense could be punished by up to 23 months imprisonment.

35. U.S. v Hernandez-Garduno, 460 F.3d 1287 (10<sup>th</sup> Cir. 2006): A Third Degree Assault in Colorado may be a crime of violence for purposes of the Immigration guideline and Career Offender. An examination of the charging document, plea agreement, plea colloquy, or sentencing court findings is necessary to conclude the issue.

36. U.S. v West, 550 F.3d 952 (10<sup>th</sup> Cir. 2008): A conviction for Failing to Stop at a Police Officer’s Command, involving conduct that is “willful or wanton,” is a crime of violence under the “otherwise” clause for Armed Career Criminal enhancement. Although not similar to the enumerated offenses, the Tenth Circuit rules that per Begay, offenses that are “purposeful, violent and aggressive” are qualifying crimes of violence.

37. Chambers v United States, 129 S.Ct. 687 (2009): Failing to return to custody from work release, or failing to return to a halfway house, is not a violent felony. Escaping from a secure facility or escaping from the custody of a law enforcement officer is a violent felony.

38. U.S. v Zuniga, 553 F.3d 1330 (10<sup>th</sup> Cir. 2009): Possessing a deadly weapon in a penal institution is considered a violent felony post-Begay, as the conduct is “purposeful, violent and aggressive.” This is so, even though part of the Texas statute would allow a conviction for “reckless” possession of a deadly weapon. The Tenth Circuit indicated that generally a person possessing a deadly weapon in a penal facility would do so knowingly and intentionally.

39. U.S. v Dennis, 551 F.3d 986 (10<sup>th</sup> Cir. 2008): Taking Indecent Liberties with a Child, under Wyo. Stat. § 14-3-105 is not a crime of violence as defined in U.S.S.G. § 4B1.2 because a conviction may be obtained from proving consensual sexual contact between persons if one of them is under age 18. The lack of an age differential and the fact that a victim may be 17 years old were instructive to the Tenth Circuit determining that this particular statute is not a crime of violence.

40. Greenlaw v U.S., 128 S.Ct. 2559 (2008): It is beyond the scope of appellate review to require a District Court to impose a sentence in excess of what the United States has allowed through failing to exercise its right to appeal. This case appears to overturn *U.S. v Moyer*, supra.

41. U.S. v Krejcarek, 453 F.3d 1290 (10<sup>th</sup> Cir. 2006): Colorado third degree assault is a crime of violence for Career Offender purposes as it presents serious potential risk of physical injury to another.

42. U.S. v Paxton, 422 F.3d 1203 (10<sup>th</sup> Cir. 2005): Colorado third degree assault is crime of violence per U.S.S.G.

§ 4B1.2, and *Perez-Vargas* does not control, as there is no residual clause in U.S.S.G. § 2L1.2, whereas there is in U.S.S.G. § 4B1.2.

43. *U.S. v Austin*, 426 F.3d 1266 (10<sup>th</sup> Cir. 2005): Colorado Sexual Assault on a Child, under age 15, sexual contact, perp at least four years older, is a crime of violence per U.S.S.G. § 4B1.2.

44. *U.S. v Rooks*, 2009 WL 530814 (10<sup>th</sup> Cir. (Okla)): *Begay*, which addressed violent felonies under the Armed Career Criminal Act, is equally instructive in determining crimes of violence under the Career Offender guideline. Considering a Texas crime of Third Degree Sexual Assault, the 10<sup>th</sup> Circuit determined that intentionally penetrating the anus or sexual organs of a minor without consent is a crime of violence under the residual clause, as “serious risk of bodily injury is a constant in cases involving sexual battery.”

45. *U.S. v Tiger*, 538 F.3d 1297 (10<sup>th</sup> Cir. 2008): *Moore* overruled. Felony DUI is not a crime of violence under Career Offender at U.S.S.G. § 4B1.2. It is not conduct that is “purposeful, violent and aggressive.”

46. *U.S. v Garcia-Caraveo*, 586 F.3d 1230 (10<sup>th</sup> Cir. 2009): Modern generic robbery includes offenses in which force or threat of force is used to retain property immediately after it is unlawfully taken or to escape with the property. This is an expansion of common-law robbery, which required the force to be used during the taking of the property. Many states have revised their robbery statutes to comprise the expanded conduct.

47. *U.S. v Shipp* 589 F.3d 4827367(10<sup>th</sup> Cir. 2009): The 10<sup>th</sup> Circuit rules that *Chambers* should be applied retroactively, as a substantive change in law. If an ACCA enhancement is based in part on a non-violent escape, the sentence is no longer valid.

48. *Johnson v United States*, 130 S.Ct. 1265 (U.S., 2010): The Supreme Court rules that unconsented touching resulting in a battery conviction is not “violent” and thus does not meet the definition of physical force in 18 U.S.C. § 924(e).

49. *U.S. v Wise*, 597 F.3d 1141 (10<sup>th</sup> Cir. 2010): The *West* case, *supra*, is extended to the Career Offender definition in U.S.S.G. 4B1.2. *Chambers* does not overrule or weaken *West* in this regard.

50. *U.S. v Atkins*, 379 Fed. Appx. 762, 2010 WL 2073594 (10<sup>th</sup> Cir. 2010) Unpublished: The Colorado statute for Vehicular Eluding is a crime of violence per *West* and *Wise*.

51. *U.S. v Beckstrom*, 20011 WL 3198254 (10<sup>th</sup> Cir. 2011): An enhancement for two prior drug trafficking offenses was approved where the one conviction for CCE, alleged three substantive crimes, including a state drug trafficking conviction that was used as the second enhancer. The 10<sup>th</sup> Circuit determined these were “separate criminal episodes,” particularly noting the defendant continued drug trafficking activity after being apprehended and sentenced for the state offense.

52. *Sykes v United States*, 131 S.Ct. 2267 (2011): The Supreme Court held that vehicular eluding is a violent felony under the “otherwise” clause in 18 U.S.C. § 924(e).

## **XVIII. Probation 5B1.1**

1. *U.S. v Armitage*, 97 F.3d 1465 (10th Cir. 1996): In contrast to the 2nd Circuit, which ruled in *U.S. v Doe* 79 F.3d 1309 (2nd Cir. 1996), that notification of third party risk should be specifically imposed by the Court to be enforceable, the 10th Circuit indicates that as long as the standard condition of supervision allowing the probation officer to make disclosure is contained in the Judgment and Conviction Order, it is not subject to attack. This is true even if it means the offender may lose his job or be forced into a new line of work.

2. *U.S. v Knights* 122 S.Ct. 587 (2001): When conditions of probation allow for a search “at any time, with or without a search or arrest warrant or reasonable cause, by any probation or law enforcement officer,” a law enforcement officer may, with reasonable suspicion, conduct a warrantless search to look for evidence of a new crime. Searches are not limited to those with a “probationary purpose.”

3. *U.S. v Carter*, 511 F.3d 1264 (10<sup>th</sup> Cir. 2008): The Tenth Circuit determines that a probation search is a “special need” which allows an infringement upon the right of privacy that would be unconstitutional if applied to the public at large. The language allowed for a search at any time, based upon reasonable suspicion to believe the individual was violating terms of supervision. This language is similar to the condition imposed by most U.S. District Courts.

## **XVIX. Incarceration 5C1.1**

1. None

## **XX. Supervised Release/Parole 5D1.1**

1. U.S. v Robinson, 62 F.3d 1282 (10<sup>th</sup> Cir. 1995): 10<sup>th</sup> Circuit rules the original term of imprisonment, plus any term of incarceration imposed for revocation of TSR, may exceed the statutory maximum, as in the case of TSR following a 5 year term for 924(c).
2. U.S. v Acuna-Diaz, 86 F.3d 1167 (10<sup>th</sup> Cir. 1996): 10<sup>th</sup> Circuit rules it is proper to impose consecutive sentences for an underlying felony conviction and a TSR revocation based upon the exact same conduct. Cross reference to IX. Immigration.
3. Whitney v. Booker 147 F.3d 1280 (10<sup>th</sup> Cir. 1998): The 10<sup>th</sup> Circuit joins other circuits in holding that a term of special parole is equivalent to pre-9-13-94 supervised release, and cannot be re-imposed after imprisonment following revocation. The way to treat a release after revocation of a special parole term is to treat it as regular parole, on a prison sentence equal to the length of the special parole term. Upon release after revocation, any time on the street or in custody on a new violation is credited toward the special parole term, and it expires when any combination of street time and custody equals the length of the special parole term.
4. U.S. v Bartsma, 198 F.3d 1191 (10<sup>th</sup> Cir. 1999): Bartsma was convicted of Felon in Possession of a Firearm. At sentencing, the Court ordered that as a condition of TSR, he be required to register as a sex offender in any community in which he lived, but no notice was given in the PSR that such a condition would be recommended. The 10<sup>th</sup> Circuit held that where a special condition is not, on its face, related to the offense of conviction, notice is required and the Court must explain its rationale for the condition.
5. U.S. v Johnson, 120 S.Ct. 1114 (2000): If a defendant has served a longer prison sentence than the one imposed after a successful appeal, the U.S. Supreme Court holds the term of supervised release must nevertheless commence on the day the offender is released, and cannot be artificially determined to have commenced earlier.
6. U.S. v. Erwin, 299 F.3d 1230 (10<sup>th</sup> Cir. 2002): This case holds that occupational restrictions, including limiting access to computers or the Internet due to prior conviction for incest, must be related to the *offense of conviction*, and reasonably necessary to protect the public.
7. U.S. v Plotts, 347 F.3d 873(10<sup>th</sup> Cir. 2003): The defendant challenged whether collecting a DNA sample as a condition of supervised release was a legitimate exercise of Congressional power, for defendants convicted of certain sex crimes. The 10<sup>th</sup> Circuit determined such collection is legitimate under the Necessary and Proper Clause.
8. U.S. v Antelope, 395 F.3d 1128 (9<sup>th</sup> Cir. 2005): Antelope had his supervised release term revoked for refusing to disclose information regarding his prior sex history in sex offender counseling. The 9<sup>th</sup> Circuit concluded this was a violation of the Fifth Amendment, because it was clear that his refusal to answer resulted in additional incarceration.
9. U.S. v Mitchell, 429 F.3d 952 (10<sup>th</sup> Cir. 2005): Requiring an offender to comply with prior restitution orders is not in itself an order of restitution, and is reasonably related to the goal of deterring future criminal conduct.
10. U.S. v Bruce, 458 F.3d 1157 (10<sup>th</sup> Cir. 2006): Where the defendant was convicted of Assault with a Dangerous Weapon and Assault Resulting in Serious Bodily Injury, and a special condition of supervised release was imposed allowing searches without the need for reasonable suspicion, a remand was ordered because the defendant was not given notice in the Presentence Report.
11. U.S. v Atencio, 476 F.3d 1099 (10<sup>th</sup> Cir. 2007): A special condition of supervised release, requiring sex offender registry, was vacated because the Court failed to provide notice, when the instant offense was not a sex offense. It appeared the condition was considered discretionary and not imposed pursuant to a statutory requirement, such as the Adam Walsh Act.
12. U.S. v Metzener, 584 F.3d 928 (10<sup>th</sup> Cir. 2009): The Tenth Circuit upholds a TSR revocation for failure to “participate” in a sex offender treatment program after the defendant failed a polygraph and admitted he had viewed adult pornography and frequented prohibited places, as his contract with the provider required h<sup>im</sup> to refrain from engaging in these behaviors. However, the Tenth Circuit strongly suggested additional language in TSR conditions, to include “participate in and complete a treatment program,” or “participate in a treatment program and comply with

all the rules and directives of the program.”

13. U.S. v Begay, 631 F.3d 1168 (10<sup>th</sup> Cir. 2011): A U.S. District Court is authorized to modify the conditions of supervised release without the necessity of a change in circumstances. In this case, the Court added a polygraph condition in the case of a sex offender upon his release from a 14-year prison sentence.

14. U.S. v Mike, 632 F.3d 686 (10<sup>th</sup> Cir. 2011): Conditions of supervised release must be reasonably related to at least one of the following factors: (1) the nature and circumstances of the offense; (2) the defendant’s history and characteristics; (3) the deterrence of criminal conduct; (4) the protection of the public from further crimes by the defendant; (5) and the defendant’s educational, vocational, medical or other correctional needs. Also, the conditions must involve no greater deprivation of liberty than reasonably necessary to achieve the purpose of deterring criminal activity, protecting the public, and promoting the defendant’s rehabilitation. The Court may not delegate to the Probation Officer the authority to impose residential treatment or plethysmograph testing, as they involve a significant liberty interest. Restrictions on computer use must be carefully worded to avoid being overly broad. Employment restrictions and third party notification must be justified.

15. U.S. v Lonjose, 2011 WL 6811038 (10<sup>th</sup> Cir. 2011): The Tenth Circuit carves out a gender distinction on addressing risk to minors by sex offenders. An offender who victimizes females, for example, cannot be automatically restricted from associating with minor males.

## **XXI. Fine/Restitution**

1. U.S. v Shirley Thompson 39 F. 3d 1103 (10<sup>th</sup> Cir. 1994): If the defendant agrees to pay restitution as part of a plea agreement, the Court does not have to make an independent finding of ability to pay.

2. U.S. v Gilbreath 9 F.3d 85 (10<sup>th</sup> Cir. 1994): If there is some evidence of hidden assets, restitution order may consider these in assessing ability to pay.

3. U.S. v Thomas Michael Phillips 139 F.3d 913, 1998 WL 51743 (10<sup>th</sup> Cir. Kan) unpublished: Although the 10<sup>th</sup> Circuit cannot answer the question in this case because there was not a timely appeal, the 10<sup>th</sup> Circuit leaves little question that a sentencing Court must set a restitution schedule, and cannot delegate the setting of payment schedules to the Probation Office. Case law from the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 11<sup>th</sup> Circuits is cited.

4. U.S. v Nichols, 169 F.3d 1255, 1279-80 (10<sup>th</sup> Cir. 1999): In declining to follow the majority of Circuits, the Tenth Circuit announces that restitution is not “punishment” and therefore there is no harm in applying the Mandatory Victim Restitution Act retroactively, to crimes committed before April 24, 1996, as long as sentencing occurs after that date.

5. U.S. v Julian, 242 F.3d 1245 (10<sup>th</sup> Cir. 2001): The 10<sup>th</sup> Circuit indicates restitution may be imposed for future counseling expenses incurred by the victim, but the need for and the estimated cost of counseling must be provided at the time of sentencing through the presentence report. The amount of restitution cannot be left open-ended – it must be specified at the time of sentencing.

6. U.S. v Reano, 298 F.3d 1208 (10<sup>th</sup> Cir. 2002): Failure to abide by the notice periods specified in 18 U.S.C. § 3664 can result in the Court’s inability to order restitution. The United States must provide to the Probation Office, upon request, 60 days prior to sentencing with a list of the amounts subject to restitution, and the Probation Office must inform the Court 10 days prior to sentencing if restitution will not be ascertainable. Failure to abide by these procedural requirements is a bar to ordering restitution at any later date. The Court made a limited exception in Reano’s case because the Court had placed Reano “on notice” that restitution would be ordered in 90 days when it imposed restitution of \$10,000 based upon probable hospital expenses.

7. U.S. v Gordon, 480 F.3d 1205 (10<sup>th</sup> Cir. 2007): This case continues the trend that restitution is limited to the offense of conviction. The calculation of loss for Guideline purposes and the calculation of restitution are completely separate issues. Plea Agreements must be specific if the restitution order will include amounts beyond the count(s) of conviction.

8. U.S. v Ahidley, 486 F.3d 1184 (10<sup>th</sup> Cir. 2007): The Tenth Circuit holds it is plain error for a District Court to impose restitution “due immediately” with no payment schedule without a finding that the defendant is, in fact, able to pay restitution immediately. They, and every other Circuit Court in the country, are unsympathetic to the

difficulties that may be occasioned by the Bureau of Prisons if the “due immediately” language is not present.

9. U.S. v Hunter, 548 F.3d 1308 (10<sup>th</sup> Cir. 2008): Under the Crime Victim Rights Act of 2004, a family of a deceased victim in a mass homicide could not reopen the sentencing of Hunter, who had provided the handgun to the shooter, but had no knowledge that the recipient planned to commit murder with the firearm. The CVRA of 2004 only authorizes a presumed victim to file a Writ of Mandamus, and cannot “appeal” a sentence.

10. U.S. v Speakman, 594 F.3d 1165 (10<sup>th</sup> Cir. 2010): The defendant worked for Merrill Lynch, and siphoned off his wife’s accounts to others, including a girlfriend. His wife filed a complaint against Merrill Lynch with NASD, and ML was ordered to pay her \$1.2 million. The Court ordered the defendant to pay ML restitution of that amount, finding ML was “directly harmed” by the defendant’s scheme. The Tenth Circuit remanded, finding the record was insufficient to conclude that ML was “proximately harmed” by the defendant. Under either the respondeat superior doctrine or a negligence theory, the Tenth Circuit thought the “proximate” standard might be met. However, the arbitration order did not state the grounds for finding ML liable, and if they had committed a separate tort against Ms. Speakman, their liability could have an independent basis unrelated to Speakman’s status as employee.

11. U.S. v Speakman, 594 F.3d 1165 (10<sup>th</sup> Cir. 2010): This is the same case above, but different issue. The Court ordered \$194,000 restitution to the Crime Victim’s Fund, when the victim, Ms. Speakman, indicated she did not want a restitution order in her name payable by the defendant. However, she did not authorize or request the Court to order restitution to CVF in lieu of her, but the Court concluded it had to order the restitution anyway as restitution was mandatory. The Tenth Circuit indicated a victim must specifically assign her restitution interest to CVF in order to authorize such a restitution order.

12. U.S. v McGinty, 610 F.3d 1242 (10<sup>th</sup> Cir. 2010): It is not improper to reduce a forfeiture based upon consideration of restitution paid. Criminal forfeiture is a punishment, designed to reduce the defendant’s gain. Restitution is not punishment; rather, the goal is to restore the victim. This case was remanded as the District Court reduced the forfeiture based in part on restitution paid prior to sentencing.

13. Hughey v U.S., 495 U.S. 411 (1990): Restitution is limited to the conduct charged within the offense of conviction.

## XXII.Sentencing 5G1.1

1. U.S. v Johnny Frank Williams 46 F.3d 57 (10<sup>th</sup> Cir. 1995): Federal court can order a consecutive sentence to a state sentence not yet imposed in a pending matter, even if the state orders its sentence to run concurrently.

2. U.S. v Loya 51 F.3d 287 (10<sup>th</sup> Cir. 1995): Sentence within guideline range is not subject to appellate review.

3. U.S. v Mihaly 67 F.3d 894 (10<sup>th</sup> Cir. 1995): It is reversible error for District Court to conclude there is no option but to sentence consecutively if defendant is serving an undischarged term of imprisonment pursuant to 5G1.3(a), because 18 U.S.C. 3584(a) provides for concurrent or consecutive sentencing, and a Court may depart if it can make a record justifying the departure.

4. U.S. v George David Smith, 92 F.3d. 1197 (10<sup>th</sup> Cir. 1996): 10<sup>th</sup> Circuit rules that Sentencing Commission does not intend for USSG 5C1.2 (Safety Valve) to be applied retroactively, and is not available for sentence reductions for offenders already serving prison sentences.

5. BOP memo entitled: **"Interaction of Federal and State Sentences When the Federal Defendant is Under State Primary Jurisdiction"**. It discusses that a federal sentence cannot commence any earlier than the date of sentencing, even if ordered concurrent with an existing state or federal sentence. It also points out that if a prisoner is obtained via writ from a state sentence, the prisoner must be returned to state custody when the prosecution is finished. A federal sentence imposed concurrently to an existing state sentence will result in BOP designating the state facility for service of the federal sentence, and will be made effective on the date of the federal sentencing. If a judgment is silent, it is considered a consecutive sentence by the BOP. If a defendant has been obtained from a state sentence via writ, the federal sentencing judge **cannot** order the defendant be delivered to a federal institution to serve the sentence.

6. U.S. v Hallum 103 F.3d 87, 89-90 (10<sup>th</sup> Cir. 1996): To qualify for the Safety Valve, the defendant must demonstrate it is clearly improbable a firearm was possessed in connection with a drug offense if the government establishes proximity to the offense, even if the firearm was possessed by a codefendant.

### XXIII.

7. U.S. v Jenkins 38 F.3d 1143 (10th Cir. 1994): Pursuant to U.S. v Wilson, 503 U.S. 329 (1992), a U.S. District Court lacks jurisdiction to award **any** pretrial custody credit to a defendant. That responsibility falls to the Attorney General, through the BOP.
8. U.S. v Donald Peck, 762 F.Supp. 315, U.S. District Court, Utah, 1991: When sentencing under Assimilated Crimes Act, sentence of probation cannot exceed that imposed by state law.
9. Hicklin v State of Wyoming, 535 P.2d 743 (1975): The Supreme Court of Wyoming holds that a term of probation cannot exceed the statutory maximum term of imprisonment, less any jail term imposed.
10. U.S. v Gaskell, 134 F.3d 1039 (11<sup>th</sup> Cir. 1998): The 11<sup>th</sup> Circuit Court of Appeals is the first Circuit Court to address the length of a sentence of probation imposed under the Assimilated Crimes Act (ACA), and rejects the reasoning of Peck, supra. The 11<sup>th</sup> Circuit holds that a U.S. District Court may impose a term of probation in excess of the maximum authorized by State law, finding a federal court should not adopt provisions of State law that conflict with federal sentencing policy.
11. U.S. v Keifer 198 F.3d 798 (10<sup>th</sup> Cir. 1999): This case holds that when a defendant contests a fact in a presentence report, the government must prove that fact at the sentencing hearing by a preponderance of the evidence. The Court may not simply adopt the presentence report as its finding to resolve disputed issues. However, as noted in U.S. v Garcia, 78 F.3d 1457 (10<sup>th</sup> Cir. 1996), when the government refuses to present evidence to resolve a factual dispute, the District Court is authorized to conduct its own investigation and call its own witnesses.
12. U.S. v Tisdale, 248 F.3d 964 (10<sup>th</sup> Cir. 2001): The 10<sup>th</sup> Circuit determines that App. Note 6 (dealing with undischarged sentences after revocation) following U.S.S.G. § 5G1.3 is discretionary, and does not limit the sentencing options found in § 5G1.3(c).
13. Wedelstedt v Wiley, 477 F.3d 1160 (10<sup>th</sup> Cir. 2007): The Tenth Circuit joins the Second, Third and Eighth Circuits in holding that the BOP cannot arbitrarily set aside 18 U.S.C. § 3621(b), regarding the five factors involved in designation, and conclude that CCC placement is restricted to the last 10% of the defendant's sentence. Furthermore, the BOP has an internal memo indicating that in these Circuits, they are to consider direct designation again to CCC's if the Court so recommends and if they qualify for CCC placement otherwise...
14. U.S. v Miller, 594 F.3d 1240 (10<sup>th</sup> Cir. 2010): The BOP cannot designate a defendant unless that defendant is in federal custody, so no designation can occur if the defendant is serving an undischarged state sentence.
15. U.S. v Story, 2011 WL 590353 (10<sup>th</sup> Cir. 2011): Per 18 U.S.C. § 3582(a), it is illegal for a court to impose a period of incarceration or to increase a period of incarceration to achieve the goal of rehabilitation, even if the intent is to help a defendant qualify for the Residential Drug Abuse Program.
16. Tapia v U.S., 2011 WL2369395 (2011): The Supreme Court agrees with *Story*, supra. It is error to impose or increase a period of confinement to accomplish rehabilitation.

### XXIII. 18 U.S.C. 924(c)

1. Deal v U.S. 113 S.Ct. 1993 Supreme Court rules multiple 924c counts from one Indictment are to be run consecutively. Five years on the first one, 20 years consecutive on all the others.
2. Bailey v U.S., 116 S.Ct. 501 (1995): The S. Ct. indicates "use" and "carries" are not the same. "Use" requires "active employment" not just mere possession. "Carries" was not considered by the S.Ct. In fact, the cases of Bailey and Robinson were remanded to determine if an unloaded pistol in the trunk of a car, or an unloaded derringer locked in a trunk in a bedroom, may have been "carried" and thus still result in a conviction under 924(c). The S. Ct. said: "While it is undeniable that the active-employment reading of "use" restricts the scope of s 924(c)(1), the Government **often has other means** available to charge offenders who mix guns and drugs. The "carry" prong of s 924(c)(1), for example, brings some offenders who would not satisfy the "use" prong within the reach of the statute. **And Sentencing Guidelines s 2D1.1(b)(1) provides an enhancement for a person convicted of certain drug-trafficking offenses if a firearm was possessed during the offense**". Thus, it is clear the S. Ct. does not intend to change the operation of 2D1.1(b)(1) with this case.
3. U.S. v Miller, 84 F.3d 1244, (10th Cir. 1996): The 10th Circuit provides a definition of "carry" within the meaning of 18 U.S.C. 924(c). It is basically having dominion and control over a firearm, and intending that the firearm be available for use during a drug trafficking offense. In this case, a traffic stop revealed a 9mm pistol in a



bag in the back of a van, along with scales and meth residue. Another bag contained almost a kilo of meth, and some marijuana was found as well. The 10th Circuit said this amounted to "carrying" in relation to a drug trafficking offense.

4. U.S. v Miguel Gonzales 117 S.Ct. 1032 (1997): The 10th Circuit ruled that a sentence under 18 U.S.C. 924(c) could and should be imposed concurrently with a state prison term the defendant was already serving in connection with the same underlying criminal activity. The Supreme Court reversed, indicating the plain language of 924(c), stating that a sentence under the statute may not be imposed concurrently to "any other term of imprisonment" applies to state as well as federal sentences. This in spite of the fact that the firearms were used in the underlying state drug offense, and were used to enhance the underlying state drug sentences in an operation almost identical the 924(c). The 10th Circuit indicated it was trying to avoid "an absurd result."

14. Muscarello v. United States, 118 S.Ct. 1911 (1998): In a 5-4 vote, the Supreme Court holds that the term "carry" as defined in 924(c) does not require immediate accessibility of the firearm. A firearm in a locked glove compartment or stored in the trunk of a car meets the definition if it is carried "during or in relation to a drug trafficking crime."

15. U.S. v Sorensen, 915 F.2d 599 (10<sup>th</sup> Cir. 1990); U.S. v Schaeffer, 110 F.3d 530 (8<sup>th</sup> Cir. 1997); U.S. v Aponte, 36 F.3d 1050 (11<sup>th</sup> Cir. 1994): These cases establish that when a defendant is convicted of 924(c), the Court can depart below the mandatory minimum term of 60 months pursuant to a motion for Substantial Assistance. However, the 924(c) sentence still cannot be concurrent, so, for example, if the Court wished to impose a sentence of 30 months, if there were two counts of conviction, the Court could impose a 24-month term followed by 6 months consecutive on the 924(c) count.

16. U.S. v Bazile, 209 F.3d 1205 (10<sup>th</sup> Cir. 2000) and U.S. v Wheeler, 200 WL 1576135 (10<sup>th</sup> Cir.(Kan)): These two cases establish that the language of "not less than" added to 924(c) penalty options in 1998 allows for sentences exceeding the mandatory minimum, but only if the guideline range exceeds the mandatory minimum. In the case where the gun count is the only count, calculate the guideline range as if the underlying count existed, making sure to add in the enhancement for use or possession of a firearm. ***However, these cases are effectively overruled by the November 1, 2000 Edition of the Guidelines Manual, which directs that the mandatory minimum will be the guideline range, unless an upward departure is warranted, in U.S.S.G. § 2K2.(a)(2) and Commentary.***

17. U.S. v Concha, 233 F.3d 1249 (10<sup>th</sup> Cir. 2000): Foreign convictions cannot be used as predicate offenses for the Armed Career Criminal Act.

18. Harris v. United States, 536 U.S. 545 (S.Ct. 2002): The enhanced penalties for "brandishing" and "discharging" a firearm under 18 U.S.C. § 924(c) are sentencing factors to be determined by the Court by a preponderance, and need not be alleged in the charging document. McMillian is reaffirmed vis-a-vis Apprendi, in this 5-4 decision.

19. U.S. v Battle, 289 F.3d 661 (10<sup>th</sup> Cir. 2002): A conviction for 18 U.S.C. § 924(j) is in fact also a conviction for 18 U.S.C. § 924(c), requiring a consecutive sentence per 924(c).

20. U.S. v Luke-Sanchez, 483 F.3d 703 (10<sup>th</sup> Cir. 2007): Trading drugs for guns is a 924(c) offense, in that it involves possession of a firearm in furtherance of a drug trafficking crime.

21. U.S. v Cota-Loaiza, 936 F.Supp. 751 (10<sup>th</sup> Cir. 1996): Bailey applies retroactively per Davis v U.S., 417 U.S. 333 (1974), and refers to U.S. v Fletcher, 919 F.Supp 384, (10<sup>th</sup> Cir. 1996). Good discussion of general policy on retroactivity.

22. U.S. v Villa, 589 F.3d 1334 (10<sup>th</sup> Cir. 2009): A 924(c) sentence should be imposed consecutively to any other sentence, notwithstanding the "prefatory clause." It must be imposed consecutively even if the underlying sentence(s) has a higher mandatory minimum term of imprisonment.

23. U.S. v O'Brien, 130 S.Ct. 2169 (U.S.) 2010: Using or carrying an illegal weapon such as a machinegun or sawed-off shotgun is an element of the offense which must be proven beyond a reasonable doubt to trigger the 30-year mandatory minimum. However, brandishing and discharging a firearm are still sentencing factors which may be determined by the sentencing judge. Harris and McMillan survive again, in a 5-4 decision.

24. Watson v U.S., 128 S.Ct. 579 (2007): Receiving a firearm for drugs is not "use of a firearm" in connection with a drug trafficking offense.

## XXIV. Revocations

1. Revocation memo dated 8-16-94

2. U.S. v Rockwell 984 F.2d 1112 (10th Cir. 1993): Controlled substance in a person's body is "possession" for purposes of statute requiring termination of TSR for possession...
3. U.S. v Twitty, 44 F.3d 410 (6th, 1995): Sixth circuit rules that conduct occurring before sentencing cannot result in probation revocation. However, Twitty cites an 11th circuit case, U.S. v James, 848 F.2d 160 (11th Cir. 1988) which holds the opposite. No 10th circuit case known at this time.
4. U.S. v Hurst, 78 F.3d 482 (10th Cir. 1996) Revocation guidelines in USSG 7B1.4 are **advisory only**, and do not carry the same authority as "Commentary" as defined in Stinson v U.S., 508 U.S. 36, 113 S.Ct. 1913 (1993). While the Court must consider the guideline range, "If the court imposes a sentence in excess of that recommended in Chapter 7, we will not reverse if it can be determined from the record to have been reasoned and reasonable." In this case, the guideline range was 4-10 months, and the court sentenced the defendant to 24 months, the statutory maximum. No problem, according to 10th Circuit.
5. U.S. v Burdex, 100 F.3d 882 (10th Cir. 1996): Burdex had been on TSR only two months, and tested positive for cocaine and marijuana; he missed two other UA's; he admitted smoking marijuana "dusted" with cocaine. These allegations were the basis of a revocation hearing. His Chapter 7 guideline range was 8-14 months. The Court found that inadequate and sentenced him to 24 months, the statutory maximum under 18:3583(e)(3) for a class C or D felony. The 10th Circuit had no problem with the sentence. In addition to citing Hurst 78 F.3d 482 (10th Cir. 1996), and reiterating that Chapter 7 statements are "advisory in nature", the 10th Circuit also ruled that **"a sentence in excess of the Chapter 7 range is not a departure from a binding guideline."** Therefore, the Court is not required to give the defendant "notice" of intention to depart.
6. U.S.v Armando Fernandez, 139 F.3d 913, 1998 WL 58158(10th Cir. N.M.): The 10th Circuit clarifies that, when a violation warrant is lodged as a detainer against a defendant who is unavailable for a revocation sentence because he is serving another prison sentence, the "reasonable time" clock per F.R.Crim.P. 32.1(a)(2) does not start running until the defendant comes into custody pursuant to the detainer, not when the detainer is filed.
7. U.S.v Lin Davis, 151 F.3d 1304 (10<sup>th</sup> Cir. 1998): The 10<sup>th</sup> Circuit becomes the first Circuit Court to examine the issue of whether or not Probation Officers are authorized to bring petitions before the Court and initiate revocation proceedings. The 10<sup>th</sup> Circuit decides Probation Officers are so authorized.
8. Johnson v. United States, 120 S.Ct. 1795 (2000): The Supreme Court determines that reimposition of supervised release is implied in 18 U.S.C. § 3583(e), and holds that for offenses occurring prior to 9-13-94, District Courts are allowed to revoke TSR and impose a term of incarceration and TSR as long as the total length does not exceed the statutory maximum term of TSR originally available. So, for instance, if the original term of TSR authorized was three years, the District Court could impose 24 months incarceration and 12 months TSR upon revocation of the original TSR term.
9. U.S. v Antelope, 395 F.3d 1128 (9<sup>th</sup> Cir. 2005): A sex offender on supervised release in Montana had his TSR revoked twice for failure to participate in polygraph testing because he was not promised immunity from prosecution, and the sex offender program he was in told him that information about any prior crimes he admitted could be released to authorities.
10. U.S. v Hammonds, 370 F.3d 1032 (10<sup>th</sup> Cir. 2004): A single positive drug test, where the substance is knowingly ingested (as opposed to accidentally or unknowingly consumed) is "possession of a controlled substance" and revocation is mandatory.
11. U.S. v Hernandez, 2011 WL 3673042 (10<sup>th</sup> Cir. 2011): In accordance with the plain language of 18 U.S.C. § 3583(e)(3), the Court may impose up to the statutory maximum on each revocation, but once the total is reached on all revocations, no term of supervised release may be imposed.

## XXV. Felony definitions

1. U.S. v Brunson 907 F.2d 117 (10<sup>th</sup> Cir. 1990): Violent felony definition is to be determined by guidelines, not state law definition.

## XXVI. Departures

1. Koon v. U.S., 518 U.S. 81 (1996): Supreme Court rules that appellate review standard for departures should not be de novo, but rather should ask if the sentencing court abused its discretion. De novo review means the appellate court is taking a "new" look at the departure, as if the District Court's decision did not exist, and comes up with its own idea. Restricting the Circuit Court to deciding only if the District Court "abused its discretion" means in effect that even if the Circuit Court does not like the decision of the District Court, it cannot change the decision unless it finds the District Court committed a definable error in judgment - for example, basing a downward departure on a factor the Sentencing Commission says is already accounted for in the Guidelines. This ruling should mean that more departures will be upheld by the Circuit Courts.
2. U.S. v McClatchey, 316 F.3d 1122 (10<sup>th</sup> Cir. 2003): A downward departure based on extraordinary family circumstances/responsibilities is warranted when the defendant is the only individual who could possibly care for his dependents, and is indispensable to avoid legally neglecting the dependents.
3. U.S. v Dozier, 444 F.3d 1215 (10<sup>th</sup> Cir.2006): The Tenth Circuit considers whether the Supreme Court case of Burns v United States, 501 U.S. 129, 138, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991), is still good law, post-Booker. The conclusion is that it does survive Booker, and therefore, a District Court is still required to give notice to the parties before departing or granting a variance upward or downward from the applicable advisory Guideline range.

## XXVII. Plea Agreements USSG 6B1.1

1. U.S.v Carlos San Roman-Zarate 115 F.3d 778 (10th Cir. 1997): The 10th Circuit addresses statements made after arrest to law enforcement officers who advise of Miranda rights, and then promise leniency for cooperation. Such statements are not considered part of plea negotiations, nor are they protected under U.S.S.G 1B1.8. Any such statements are properly used to calculate relevant conduct. After all, part of the Miranda warning says that any statements made will be used against the defendant in court...
2. U.S. v Calvin Brown 125 F.3d 863 (10th Cir. 1997): The 10th Circuit refused to consider an appeal where the defendant had signed a plea agreement containing a waiver of appeal.
3. U.S.v Robert Dennis Bunner, 134 F.3d 1000 (10th Cir. 1998): A defendant entered into a plea agreement, pleading guilty to a 924(c) charge, and in return, other counts of the Indictment were dismissed. After the Bailey decision, the defendant filed a 2255 motion which was granted by the Court. Thereafter, the United States filed a motion to reinstate the dismissed counts, arguing the defendant breached his plea agreement by attacking his sentence. The 10th Circuit agreed, holding that the defendant had the choice to ignore the Bailey decision, and when he did not and instead sought relief, he was relieved of his obligation under the plea agreement. The United States was then faced with a choice to either perform according to the letter of the plea agreement, or it could seek discharge, and it sought to be discharged and return both parties to the positions they occupied before the plea agreement was negotiated.
4. U.S. v Atterberry, 144 F.3d 1299 (10<sup>th</sup> Cir. 1998): A written waiver of the right to appeal, contained in a plea agreement, is not superseded by a casual mention of the right to appeal by the Court at sentencing. Contrast to recent 9<sup>th</sup> Circuit opinion.
5. U.S. v Gaskin, 145 F.3d 1347 (10<sup>th</sup> Cir. 1998): It is not breach of plea agreement if a defendant is not designated to Boot Camp as recommended by Court per a plea agreement. The sentencing court has no authority to order placement in a treatment facility or to any program of the BOP.
6. U.S. v Black, 201 F.3d 1296 (10<sup>th</sup> Cir. 2000): The 10<sup>th</sup> Circuit holds that where a defendant has agreed to waive the right to appeal in a written plea agreement, the sentencing court cannot grant relief to the defendant from such a provision by verbal statements made at sentencing. Once the Court accepts a plea agreement, it is bound by its terms unless exceptional circumstances exist, such as fraud to the Court or violation of public policy.
7. Freeman v U.S., 131 S.Ct. 2685 (U.S.): Supreme Court indicates that a District Court may resentence a defendant whose sentence was imposed per a Rule 11(c)(1)(C) Plea Agreement, if the stipulated sentence was "based upon" a sentencing guideline range that has subsequently been lowered, and the revision has been made

retroactive per 18 U.S.C. § 3582(c)(2). The Freeman case involved cocaine base.

## **XXVIII. Organizational Defendants**

1. U.S. v Eureka Laboratories, Inc. 103 F.3d 908 (9th Cir. 1996): This is apparently the first appellate decision in any Circuit dealing with a Chapter 8 application. It concerns the Court's authority under 8C3.3 to impose a fine within the fine guideline range that would seriously jeopardize an organization's continued viability. The 9th Circuit ruled that the reduction of a fine which would effectively put a company out of business is within the discretion of the District Court, and the only mandate to lower a fine is when it interferes with the company's ability to pay restitution.

## **XXIX. Juvenile Law**

1. U.S. v R.L.C. 112 S.Ct. 1329 (1992): The Supreme Court indicates when 18 U.S.C. 5037(c)(1)(B) states a juvenile cannot be sentenced beyond the maximum penalty authorized for a similarly situated adult, the "maximum" refers to the sentence determined by the Sentencing Guidelines, not the statutory maximum. A factor that may warrant upward departure for an adult would also warrant a "departure" for a juvenile.
2. U.S. v A FEMALE JUVENILE 103 F.3d 14 (5th Cir. 1996): The 5th Circuit rules that a probationer who was under 18 at the time of the original offense, but who is between the ages of 18 and 21 at the time of resentencing on a probation revocation, is to be sentenced under the guidelines of the Juvenile Delinquency Act for individuals between the ages of 18 and 21, rather than the guidelines for individuals under age 18. The defendant has filed a writ of certiorari with the Supreme Court. No other case law exists on this issue.
3. U.S. v John DOE 53 F.3d 1081 (9th Cir. 1995): The 9th Circuit rules that since 18 U.S.C. 5031-5042 (the Juvenile Act) contains no mention of Supervised Release, it is therefore unavailable as a sentencing option for juveniles. There are no other cases addressing this issue from other Circuits at this time.
4. U.S. v Gregory Thomas 114 F.3d 228 (D.C. Cir. 1997): Where an on-going criminal activity begins before age 18 and continues after age 18, and the defendant is convicted of conduct occurring after age 18, acts committed prior to age 18 are properly included as relevant conduct.
5. U.S. v Gordon K., 257 F.3d 1158 (10<sup>th</sup> Cir. 2001): Holds that Fed. R. Crim. P. 35(c) applies to juvenile sentencings. Therefore, sentences cannot be modified unless the strict conditions of Rule 35(c) are met.

## **XXX. 28 U.S.C. 2255 Motions and Other Appeals Issues**

1. U.S. v Mendoza, 118 F.3d 707, (10th Cir. 1997): When a defendant successfully attacks a 924(c) conviction under Bailey, but does not challenge any other portion of his original sentence, the defendant nevertheless has no legitimate expectation of finality in an unchallenged sentence imposed in the same case. At resentencing, the District Court applied a two-level possession of firearm enhancement on the remaining drug conspiracy count, which was not applied at the initial sentencing due to the 924(c) conviction. The defendant asserted the District Court had no jurisdiction to alter the conviction on the conspiracy count, because he had not challenged it, but the 10th Circuit joined seven other Circuits in holding that a 924(c) offense and the underlying offense are interdependent, result in an aggregate sentence, and are not sentences that can be treated discretely. When one count which is vacated is part of a "sentencing package", the entire judgment is to be set aside.
2. U.S. v James Mandell Lewis, 138 F.3d 840 (10th Cir. 1998): When a challenged conviction is part of a sentencing package, the District Court has jurisdiction to "abrogate an entire plea agreement under section 2255, even when that entails vacating unchallenged counts of conviction." Quoting U.S. v. Barron, 127 F.3d 890,895, (9th Cir. 1997). Here, Lewis successfully challenged his 924(c) conviction, under Bailey, and he had pled to the

924(c) count as part of a plea agreement in which all remaining counts were dismissed. The 10th Circuit held that, if Lewis wished to exert his right to have the count of conviction vacated, the entire plea agreement would be voided, and Lewis would again be subject to prosecution on the dismissed charges.

3. U.S.v. Priscilla Deters, 143 F.3d 577 (10th Cir. 1998): A commitment to BOP custody for a mental competency evaluation per 18 U.S.C. 4241, 4242 and 4247(b) is an “immediately appealable” order according to the 10th Circuit. Such orders should include findings of fact concerning the need for commitment. The 10th Circuit suggests the need for commitment should be based on risk of non-appearance and danger to the community, just as other detention decisions are made pursuant to 18 U.S.C. 3142.

4. U.S. v. Michael Gaskin 145 F.3d 1347 (10th Cir. 1998): Being found ineligible for the Intensive Confinement Center and having to serve a 30 month prison sentence rather than shock incarceration is not an issue that can be addressed by the Courts. “A sentencing court has no authority to order that a convicted defendant be confined in a particular facility, much less placed in a particular treatment program; those decisions are within the sole discretion of the Bureau of Prisons,” quoting U.S. v. Williams, 65 F.3d 301,307 (2d Cir. 1995).

5. Fristoe v. Thompson, 144 F.3d 627 (10<sup>th</sup> Cir. 1998): The 10<sup>th</sup> Circuit determines that it is error for the BOP to decide that a 2-level enhancement for a firearm per 2D1.1(b)(1) turns a non-violent felony into a violent felony, as defined by 18 U.S.C. 924(c)(3), and thus deny an inmate a year off the sentence for completing the 18 U.S.C. 3621(e) drug program. The 10<sup>th</sup> Circuit cannot give the inmate credit for a year off his sentence, and instead asked the District Court to remand to BOP for action consistent with this opinion. Other Circuits have already reached this same conclusion, including the 7<sup>th</sup> and 9<sup>th</sup>.

6. U.S. v Joseph Pearce, 146 F.3d 771 (10<sup>th</sup> Cir. 1998): It is not appealable error for a District Court to refuse to resentence a defendant who has had a 924(c) conviction vacated per Bailey, so that the defendant avoids the two-level gun enhancement on the underlying drug offense. To resentence is within the Court’s discretion.

7. U.S. v Joseph Bickett, 149 F.3d 1191 (10<sup>th</sup> Cir. 1998): Failure to sentence concurrently to a related conviction is prejudicial, and failure to challenge constitutes ineffective assistance of counsel, warranting a 2255 motion. Any matter that could have been raised on direct appeal ordinarily cannot be raised in a 2255 motion, but a finding of ineffective assistance in failing to file a direct appeal leaves a defendant free to challenge the issue through a 2255 motion. See U.S. v Cook, 45 F.3d 388, 392 (10<sup>th</sup> Cir. 1995), and Strickland v. Washington, 466 U.S. 668, 687 (1984).

8. U.S. v Easterling, 157 F.3d 1220 (10<sup>th</sup> Cir. 1998): The 10<sup>th</sup> Circuit holds that a district court is entitled to revisit the entire sentence at a resentencing hearing, and is not limited to just the challenged portion of the sentence. Also, the Court reaffirms that the Guideline Manual in effect at the time of the resentencing should be used, unless there is an ex post facto issue.

9. U.S. v Cockerham, 237 F.3d 1179 (10<sup>th</sup> Cir. 2001): A defendant may waive his right to collaterally attack his sentence pursuant to 28 U.S.C. 2255. The same exceptions that apply to waivers of direct appeal also apply to collateral attack rights. A waiver does not waive the right to attack based upon ineffective assistance of counsel, challenging the validity of the plea or waiver.

10. U.S. v Guebara, 15 Fed. Appx. 584, 2001 WL 617609 (10<sup>th</sup> Cir. 2001) Unpublished: Failure to provide a bond revocation hearing is a procedural error, but does not warrant relief if there is some evidence of conduct violating pretrial release conditions.

11. U.S. v Alvarez-Pineda, 258 F.3d 1230 (10<sup>th</sup> Cir. 2001): The 10<sup>th</sup> Circuit holds that a defendant’s presence at resentencing is mandatory upon remand, even if, it appears, the resentencing’s scope has been limited by the Circuit Court to specific issues.

12. U.S. v Martin, 18 Fed. Appx. 686 (10<sup>th</sup> Cir. 2001): In this unpublished opinion, the 10<sup>th</sup> Circuit indicates that violating Fed. R. Crim. P. 32 will result in remand for resentencing only if the defendant suffered prejudice as a result of the Rule 32 violation. Prejudice occurs when the PSR contains factual inaccuracies, and, had the defendant been able to successfully object to the PSR, he would have received a shorter sentence.

13. U.S. v Hurst, 322 F.3d 1256 (10th Cir. 2003): One-year limitations period for seeking habeas relief under the Antiterrorism and Effective Death Penalty Act for filing motion to vacate is calculated using the “anniversary method” as opposed to the “calendar-year method.”

14. U.S. v Wilson Jones, 332 F.3d 1294(10<sup>th</sup> Cir. 2003): Although the PROTECT ACT only went into effect on April 30, 2003, the Tenth Circuit used its provisions, requiring de novo review of departure and requirement of written Statement of Reasons, in an offense dating from 2001 without regard for ex post facto considerations. This case sets the benchmark for crafting departures post-PROTECT ACT.

15. U.S. v Jimmy Jones, 80 F.3d 436 (10<sup>th</sup> Cir. 1996): Failure to object at sentencing to a Rule 32(b)(6)(A) violation (disclosure of PSR to defendant at least 35 days prior to sentencing) waives any procedural violation.
16. Bey v U.S., 399 F.3d 1266 (10<sup>th</sup> Cir. 2005): Booker is not retroactive and does not apply to second or subsequent habeas petitions.
17. U.S. v Price, 400 F.3d 844 (10<sup>th</sup> Cir. 2005): *Blakely* sets forth a new procedural rule but does not fit into either one of the *Teague* exceptions, and is thus does not apply retroactively to cases that were final when *Blakely* was decided on June 24, 2004.
18. U.S. v Sharkey, 543 F.3d 1236 (10<sup>th</sup> Cir. 2008): Where Career Offender applies and results in a higher offense level than the drug guideline, no reduction for Amendment 706 (crack cocaine retroactivity) is applicable.
19. Davis v United States, 417 U.S. 333, 94 S.Ct. 2298 (1974): In determining whether to apply case law retroactively, the question is whether failure to do so would result in a “fundamental defect which inherently results in a complete miscarriage of justice, and where exceptional circumstances exist where the need for collateral relief is apparent.
20. U.S. v Lawrence Williams, 575 F.3d 1075 (10<sup>th</sup> Cir. 2009): This case addresses a crack cocaine resentencing under 18 U.S.C. § 3582(c)(2), and whether the Guideline policy statement at U.S.S.G. § 1B1.10, limiting the sentence reduction to the revised guideline per Amendment 706, is binding on a District Court. The Tenth Circuit ruled that U.S.S.G. § 1B1.10 is binding, and error occurs if a District Court resents below the revised guideline range.
21. Dillon v United States, 130 S.Ct. 2683 (U.S. 2010): When a court is resentencing a defendant per a retroactive guideline application approved by the Sentencing Commission under 18 U.S.C. § 3582(c)(2), the District Court is bound to apply only the retroactive amendment and is not to engage in a de novo sentencing.
22. Pepper v United States, 131 S.Ct. 1229 (U.S., 2011): The Supreme Court rules that 18 U.S.C. § 3742(g) was invalidated by Booker, and dismantles U.S.S.G. § 5K2.19 (Post-Sentencing Rehabilitation). Using 18 U.S.C. § 3661, the Supreme Court determined that on appeal for a de novo sentencing, the District Court can consider post-sentencing rehabilitative efforts. Also, the Supreme Court rejected the defendant’s argument that he must receive the same percentage of substantial assistance departure as he had in his prior sentencing. A de novo sentencing “wipes the slate clean.” There could be limited remands in which post-sentencing rehabilitation may be improper to consider.

## XXXI. Safety Valve

1. U.S. v. Leonard, 157 F.3d 343 (5<sup>th</sup> Cir. 1998): There is no 10<sup>th</sup> Circuit case yet, but several Circuits have now held that where a defendant has an offense level of 26 but is not subject to a mandatory minimum, the defendant is still eligible for a two-level deduction per 2D1.1(b)(6). In addition, legal counsel for the Administrative Office of the U.S. Courts have construed this case to mean that a defendant convicted of any “drug crime” can receive benefit of the Safety Valve if the offense level is 26 or greater, even if the statute of conviction, such as 21 U.S.C. § 860, is one not specifically mentioned in 18 U.S.C. § 3553(f).
2. U.S. v Sierra-Robles, 188 F.3d 520, 1999 WL 535294 (10<sup>th</sup> Cir. (Colo.) unpublished: This panel of 10<sup>th</sup> Circuit judges joins other Circuits in holding that, in a case where a defendant has a Criminal History Category of I by virtue of a downward departure but nevertheless has more than one criminal history point, application of the Safety Valve is not warranted.
3. U.S. v Gama-Bastidas, 142 F.3d 1233, 1242 (10<sup>th</sup> Cir. 1998): Providing information to the Court, in chambers, immediately before sentencing, is not “too late” for purposes of evaluating whether a defendant has satisfied the fifth prong of Safety Valve eligibility. It is becoming clear that Safety Valve application and “acceptance of responsibility” operate independently. A defendant could remain silent (in some Circuits, even lie), and as long as the Court finds the defendant has truthfully provided information at the sentencing hearing, the Safety Valve can apply.
4. U.S. v. Acosta-Olivas, 71 F.3d 375 (10<sup>th</sup> Cir. 1995): In the Tenth Circuit, to qualify for Safety Valve, a defendant must disclose everything he knew about his own actions and those of his coconspirators. One may qualify for acceptance of responsibility (disclose his own conduct) and not qualify for Safety Valve (disclose conduct of others).

5. U.S. v Zavalza-Rodriguez, 379 F.3d 1182 (10<sup>th</sup> Cir. 2004): The Tenth Circuit holds it is not improper to apply a two-level enhancement for possession of a firearm in a drug offense and still apply Safety Valve if the weapon was not “connected with the offense.”
6. U.S. v Cervantes, 519 F.3d 1254 (10<sup>th</sup> Cir. 2008): In attempting to persuade the Court that a defendant has provided all he knows about the offense and relevant conduct, he may not rely upon information in the Presentence Report. The Probation Officer is not “the government,” for purposes of the Safety Valve. If the issue is contested, the defendant will likely need to testify at an evidentiary hearing to establish that he has provided all he knows.
7. U.S. v Galvon-Manzo, 642 F.3d 1260 (10<sup>th</sup> Cir. 2011): A defendant must provide information to the United States prior to the commencement of the sentencing hearing. Once the sentencing hearing begins, procedurally it is too late to qualify for Safety Valve. Also, two prior interviews in which untruthful information was provided were sufficient to discredit the defendant’s attempt to salvage Safety Valve by submitting an affidavit prior to sentencing.

## XXXII. Appendi Cases

1. Appendi v. New Jersey, 120 S.Ct. 2348 (2000): The Supreme Court rules that, other than a prior conviction, anything that increases the statutory *maximum* penalty must be submitted to the jury and proved beyond a reasonable doubt.
2. U.S. v. Danny D. Smith, 242 F.3d 392, 2000 WL 1869457 (10<sup>th</sup> Cir. (Kan)): Unpublished. The 10<sup>th</sup> Circuit holds that a specific offense characteristic – in this case a two-level enhancement for possession of a firearm in a drug case – does not have to be established by proof beyond a reasonable doubt.
3. U.S. v Dorris, 236 F.3d 582 (10<sup>th</sup> Cir. 2000): Prior convictions resulting in Armed Career Criminal do not need to be alleged in the Indictment. Prior convictions are specifically excluded from Appendi considerations.
4. Harris v. United States, 536 U.S. 545 (2002): The enhanced penalties for “brandishing” and “discharging” a firearm under 18 U.S.C. § 924(c) are sentencing factors to be determined by the Court by a preponderance, and need not be alleged in the charging document. McMillian is reaffirmed vis-a-vis Appendi, in this 5-4 decision.
5. Blakely, Jr. v. Washington, 124 S.Ct. 2531 (2004): This case appears to extend the Appendi holding to calculating specific offense characteristics. It does not address the Federal Sentencing Guidelines per se, but the dissenting opinions make clear this case will likely cause fundamental changes in federal sentencing practice.
6. U.S. v Booker, 125 S.Ct. 738 (2005): The Sentencing Guidelines are rendered advisory, but must be considered by the sentencing court.
7. Shepard v United States, 544 U.S. 13 (2005): Decided March 7, 2005, Shepard reaffirms the holding in Taylor, and refuses to expand the inquiry of whether a burglary conviction from a “non-generic” state is in fact a generic burglary. Specifically, the court may look to the terms of the charging document, the terms of a plea agreement, or transcript of colloquy between judge and defendant while outlining a factual basis, or to some comparable judicial record of this information. Shepard further erodes *Alemendarez-Torres*, and draws a distinction between the fact *of* a prior conviction, and facts *about* the prior conviction. Facts *about* a prior conviction must be proven beyond a reasonable doubt.
8. U.S. v Moore, 401 F.3d 1220(10<sup>th</sup> Cir. 2005): The Tenth Circuit examines Armed Career Criminal enhancement in light of Shepard, and determines that although *Alemendarez-Torres* may be overruled at some point, it has not been yet, and the Tenth Circuit is bound by its precedent. Furthermore, the Tenth Circuit indicates the question of whether a prior conviction is a violent felony is a question of law rather than of fact, and no Sixth Amendment issue attaches.
9. U.S. v Magallanez, 408 F.3d 672 (10<sup>th</sup> Cir. 2005): The Tenth Circuit states: “...in sentencing criminal defendants for federal crimes, district courts are still required to consider Guideline ranges which are determined through application of the preponderance standard, just as they were before. The only difference is that the court has latitude, subject to a reasonableness review, to depart from the resulting Guideline ranges.”
10. U.S. v Yazzie, 407 F.3d 1139 (10<sup>th</sup> Cir. 2005): The Tenth Circuit rules that Booker requires that 18 U.S.C. § 3553(b)(2) must be excised. This effectively overrules the portions of the Feeney Amendment which restricted Guideline departures in sex offense cases.

11. U.S. v Contreras-Martinez, 409 F.3d 1236 (10<sup>th</sup> Cir. 2005): This case involves a Chapter 7 revocation which resulted in a consecutive sentence on the supervised release violation per the Chapter 7 Policy Statement. The interesting part is that Contreras argued that because the Court gave no reasons for its discretionary decision to impose consecutive sentences, which was recommended by the Guidelines, there is no method to determine if the sentence imposed was reasoned or reasonable. The Tenth Circuit disagreed, and stated: “We made it quite clear that the sentencing court is not required to consider individually each factor listed in § 3553(a) before imposing sentence. Moreover, we do not demand that the district court recite any magic words to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider.”
12. U.S. v Bellamy, 411 F.3d 1182 (10<sup>th</sup> Cir. 2005): The Tenth Circuit joins all other Circuits which have considered the issue, and finds that Booker does not apply retroactively to criminal cases that became final before January 12, 2005.
13. U.S. v Crockett, 435 F.3d 1305 (10<sup>th</sup> Cir. 2006): Crockett’s conviction was upheld, but he was granted resentencing in light of Booker error. He requested the District Court be instructed that all sentencing facts used to determine the advisory Guideline range must be proven beyond a reasonable doubt. The Tenth Circuit refused, noting it had previously held the correct standard for findings under the Guidelines is a preponderance of the evidence. While not officially stating this was the appropriate standard after Booker, the Tenth Circuit did state that facts guiding the District Court’s exercise of discretion need not be found beyond a reasonable doubt.
14. U.S. v Kristl, 437 F.3d 1050 (10<sup>th</sup> Cir. 2006): Any sentence imposed within the correctly calculated guideline range enjoys a rebuttable presumption of reasonableness. This presumption may be rebutted by referring to other factors listed in 18 U.S.C. 3553(a). Conversely, where the guideline range has been improperly calculated, the error is considered “non-harmless,” and unreasonable, and the case will ordinarily be remanded for resentencing.
15. U.S. v Lopez-Flores, 444 F.3d 1218 (10<sup>th</sup> Cir. 2006): When a defendant does not raise any substantial contentions concerning 18 § 3553(a) factors, and the Court imposes a sentence within the advisory Guideline range, there is no error by the Court in failing to explain how § 3553(a) factors justify the sentence.
16. U.S. v Terrell, 445 F.3d 1261 (10<sup>th</sup> Cir. 2006): The Tenth Circuit holds it is not error for a District Court to give “heavy” or “substantial” weight to the Sentencing Guidelines in imposing sentence.
17. U.S. v Sanchez-Juarez, 446 F.3d 1109 (10<sup>th</sup> Cir. (2008): The Tenth Circuit stated, “Where a defendant has raised a nonfrivolous argument that the § 3553(a) factors warrant a below-Guidelines sentence and has expressly requested such a sentence, we must be able to discern from the record that the sentencing judge did not rest on the guidelines alone, but considered whether the guidelines sentence actually conforms in the circumstances to the statutory factors.” Listening to the arguments and imposing a guidelines sentence with no explanation will result in remand for resentencing.
18. U.S. v Corchado, 427 F.3d 815 (10<sup>th</sup> Cir. 2005): Facts inherent in a prior conviction include whether a defendant was on supervision, and the date of release from incarceration. These factors do not have to be proven by a jury or admitted by a defendant, and fall under the *Apprendi* exception for prior convictions.
19. U.S. v Branson, 2006 WL 2474864 (10<sup>th</sup> Cir. (Kan)): The Tenth Circuit holds that a federal sentence higher than what would have been imposed for the same offense at the state level does not make the federal sentence unreasonable.
20. U.S. v Cage, 451 F.3d 585 (10<sup>th</sup> Cir. 2006): A six-day jail sentence was considered unreasonable when the properly calculated guideline range was 46 to 57 months. The Tenth Circuit concluded the variance was inappropriate based upon the facts of the case and remanded for resentencing.
21. U.S. v Martinez-Trujillo, 468 F.3d 1266 (10<sup>th</sup> Cir. 2006): The fact that other Districts offer fast-track Immigration departures does not render a sentence unreasonable if the court does not consider this fact in sentencing.
22. U.S. v Shaw, 471 F.3d 1136 (10<sup>th</sup> Cir. 2006): This is similar to the Cage opinion, but examines the reasonableness of an upward departure, and concludes it is reasonable. The departure was not nearly as great a percentage as what was attempted in Cage. The higher sentence is not called a departure or variance, but rather a divergence.
23. U.S. v Begay, 470 F.3d 964 (10<sup>th</sup> Cir. 2006): It is error for a District Court to refuse to consider a sentence outside the guideline range simply because a “reasonable” sentence within the guideline range may be imposed. “In any given case there could be a range of reasonable sentences that includes sentences both within and outside the Guidelines range. Booker and § 3553(a) do not require the district court to limit itself to those reasonable



sentences within the Guidelines range. The court may impose a non-Guidelines sentence if the sentencing factors set forth in § 3553(a) warrant it, even if a Guideline sentence might also be reasonable.”

24. U.S. v Mateo, 471 F.3d 1162 (10<sup>th</sup> Cir. 2006): The Tenth Circuit approved an upward departure from 15 to 21 month guideline range to 120 months, based upon prior convictions that were analogized to the Armed Career Criminal statute, even though the defendant did not qualify for ACCA treatment.

25. Cunningham v California, 127 S.Ct. 856 (2007): The California Determinate Sentencing Law (DSL), was found to violate *Apprendi* and *Booker* because it authorized the judge to find facts by a preponderance standard that affected the statutory maximum penalty. The dissent indicated that *Cunningham* would render the current advisory Guideline Sentencing system unconstitutional, but the majority disagreed in dicta. Overall, *Cunningham* does not appear to jeopardize current federal sentencing practice.

26. U.S. v Atencio, 476 F.3d 1099 (10<sup>th</sup> Cir. 2007): As a notice requirement has been in place before a sentencing court could impose a departure, so a notice requirement is required before a court can impose a variance under 3553 factors outside the properly calculated advisory guideline range. Also, a special condition of supervised release, unrelated to the offense of conviction, was vacated because no notice was given.

27. U.S. v Hildreth, 485 F.3d 1120 (10<sup>th</sup> Cir. 2007): This case begins to define what is a reasonable sentence that is outside the advisory guideline range. The level of scrutiny employed by the Tenth Circuit varies depending upon the comparative difference between the sentence imposed and the advisory guideline range. A “substantial” variance requires “compelling reasons” for the variance; an “extreme” variance requires “dramatic” reasons to support the variance. A downward variance from 46 months to probation is “extreme”; from 27 months to probation is “substantial.” An upward variance of 120% would be considered “substantial; but a 421% increase is “extreme.”

28. U.S. v Allen, 488 F.3d 1244 (10<sup>th</sup> Cir. 2007): The District Court varied upward 2.5 times above the guideline range for admittedly heinous uncharged, but inchoate conduct. He was convicted of Possession of Methamphetamine with Intent to Distribute, but was sentenced as if he had committed Solicitation of Murder and Attempted Sexual Abuse and Abduction of a Child. The sentence of 360 months was considered unreasonable, primarily because the alleged conduct was totally unrelated to the count of conviction, and the Court could never have imposed such a sentence under the mandatory Guideline system. Significantly, the Tenth Circuit indicated that *Booker* was designed to bring sentencing “closer to the Sixth Amendment,” rather than have it drift farther away. Thus, it appears that the Tenth Circuit will be more tolerant of downward variances than upward variances; in this case, the sentence was equated to an “end-run” around the fundamental process of proving someone guilty beyond a reasonable doubt.

29. Rita v. United States, 127 S.Ct. 2456 (U.S. 2007): The Supreme Court, in an 8 to 1 decision, ruled that a Circuit Court of Appeals may apply a presumption of reasonableness to a district court sentence within the advisory Guideline range. However, the district court must particularly explain the reasons for the sentence imposed, in rejecting a request by the parties for a sentence outside the range. In other words, the presumption applies only to appellate review, and is not available to the district court as a means of avoiding factual and legal analysis.

30. U.S. v Conlan, 500 F.3d 1167 (10<sup>th</sup> Cir. 2007): “A district court’s job is not to impose a reasonable sentence. Rather, a district court’s mandate is to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of section 3553(a)(2). Reasonableness is the appellate standard of review in judging whether a district court has accomplished its task.” It is error to afford a presumption of reasonableness to the recommended advisory guideline sentence.

31. U.S. v Angel-Guzman, 506 F.3d 1007 (10<sup>th</sup> Cir. 2007): This case provides an historical view of Tenth Circuit appellate issues since *Booker*. It holds that, where a District Court agrees with the Sentencing Commission that a guideline range sentence is appropriate, such a sentence warrants a presumption of reasonableness from the Circuit Court, and there is no constitutional problem with this presumption, as it avoids unfettered discretion by District Courts. However, the presumption is only warranted at the appellate level, because the appellate court has the benefit of findings made by the District Court. In contrast, the District Court has no legal findings preceding its decision, and must embrace all sentencing factors in 18 U.S.C. § 3553(a) to arrive at a sentence that is sufficient but not greater than necessary. If that sentence is also a Guideline Range sentence, then the presumption of reasonableness attaches. Variances will continue to be scrutinized more closely the farther one drifts from the guideline range. This is called “gravitational pull,” and is not considered improper or unconstitutional.

32. Gall v United States, 128 S.Ct. 586 (2007): Circuit courts are to use an abuse of discretion standard in reviewing sentences imposed by District courts. The sentencing process starts with a properly calculated guideline range, but the 3553 factors are presumably equally important. The Supreme Court took a dim view of mathematical analysis of the extent of variance from the guideline range; approved the District Court's reasoned use of a prohibited factor (age and corresponding maturity level); and cautioned against "unwarranted similarity" between codefendants who are not similarly situated. If the District Court explains the reasons for the sentence, the Circuit courts will have a hard time finding abuse of discretion.
33. U.S. v Hill, 512 F.3d 1277 (10<sup>th</sup> Cir. 2008): The Tenth Circuit examined a Kansas crime of Criminal Possession of a Firearm, a Category VIII felony, carrying a sentencing range of 7 to 23 months. However, under the Kansas Sentencing Guidelines, the top end of Hill's guideline range was 11 months, and the Court could not impose a higher sentence without an upward departure, which would have to be established by facts proven beyond a reasonable doubt per Apprendi. The Tenth Circuit determined this was in effect a crime with a maximum penalty of 11 months and therefore was not a felony conviction. His federal conviction for Felon in Possession of a Firearm was thus vacated.
34. U.S. v Todd, 515 F.3d 1128 (10<sup>th</sup> Cir. 2008): This case holds that a properly calculated guideline range must be the starting point for contemplating a proper sentence, and that range must be calculated using all relevant conduct supported by a preponderance standard. It is error to only use the jury's drug finding.
35. U.S. v Smart, 518 F.3d 800 (10<sup>th</sup> Cir. 2008): This case is the first example of what "abuse of discretion" analysis looks like in the Tenth Circuit post-*Gall*. The rigid mechanism for evaluating out-of-Guideline range sentences in *Garcia-Lara* is overturned, and the Tenth Circuit holds that it must review all sentences – in or out of the Guideline range – under a "deferential, abuse-of-discretion standard."
36. Irizarry v United States, 128 S.Ct.2198 (2008): The Supreme Court rules that the Court does not need to give notice before varying from the guideline range. Notice is still required for departures. Attorneys are expected to be educated enough on 18 U.S.C. § 3553(a) factors to anticipate most issues which might warrant a variance.
37. U.S. v Munoz-Nava, 524 F.3d 1137 (10<sup>th</sup> Cir. 2008): The Tenth Circuit approves a well-reasoned variance from 46 to 57 month guideline range to a sentence of one year and one day, based in part upon the discouraged factor of "Family Ties and Responsibilities." The reasoning is comparable in some ways to the issue of youth, discussed in *Gall*.
38. U.S. v Sayad, 589 F.3d 1110 (10<sup>th</sup> Cir. 2009): Sayad was caught with 11 kilograms of cocaine hidden in a compartment in the bed of the truck he was driving. Base offense level 32. He was sentenced to 5 years probation, and the 10 Circuit upheld the sentence as procedurally and substantively reasonable. The explanation was lengthy but not extraordinarily compelling.
39. U.S. v Alvarez-Bernabe, 626 F.3d 1161 (10<sup>th</sup> Cir. 2010): In relation to the Immigration guideline, the Tenth Circuit held that just because a guideline specific offense characteristic is not based upon empirical data is not sufficient justification for a departure or variance.

### **XXXIII. Pretrial**

1. U.S. v Gilgert, 314 F.3d 506 (10<sup>th</sup> Cir. 2002): In determining "dangerousness" as found in 18 U.S.C. § 4243 of defendant who pleads not guilty by reason of insanity, for purposes of considering pretrial release, the determination by the District Court will only be disturbed if found to be "clearly erroneous."

### **XXXIV. Mental Health**

1. U.S. v Gilgert, 314 F.3d 506 (10<sup>th</sup> Cir. 2002): In determining "dangerousness" as found in 18 U.S.C. § 4243, the determination by the District Court will only be disturbed if found to be "clearly erroneous." The same standard applies to the District Court's finding regarding competency to stand trial.